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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1053

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE GENERAL TIRE & RUBBER COMPANY and THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Firestone Tire & Rubber Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit issuing a writ of mandamus directing transfer of Civil Action 12,932, in the midst of trial, from the District of Maryland to the Northern District of Ohio.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals, not yet officially reported, is reprinted in Appendix A, *infra,* p. 1a. The opinion of the District Court for the District of Maryland has not been reported, but is reprinted in Appendix B, *infra,* p. 22a.

JURISDICTION

The *en banc* order of the Court of Appeals (Appendix A, *infra,* p. 19a), directing Judge Watkins of the District Court for the District of Maryland "to enter an order directing the transfer of the said civil action to the said District Court for the Northern District of Ohio," was entered on January 12, 1967, one day following the filing of its opinion in this case. This petiton for a writ of certiorari was filed within 90 days of the entry of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in the midst of trial of a civil action, a federal court of appeals has the power under 28 U.S.C. § 1651 to disregard the sole ground for transfer urged before the trial judge and the appellate court, *sua sponte* substitute a new ground of its own choice and, on a *de novo* determination of the applicability of such new ground in view of facts largely not of record, issue a writ of mandamus ordering transfer.

2. Whether 28 U.S.C. § 1404(a) empowers the transfer of a civil action, primarily in the interest of "effective administration and supervision of the courts of our circuit", in circumstances where (a) the trial of the action has been underway for over two and a half years, (b) a massive record has been compiled at great expense to the parties and with a great expenditure of the time and talents of the trial judge, (c) many of the key witnesses after testifying in the case are now dead or otherwise unavailable for further testimony, and (d) the transfer would likely necessitate a retrial of the entire case, in the absence of the

now unavailable witnesses, thereby wasting all the testimony, exhibits, energies, time and expenses devoted to the case prior to transfer.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1404(a), Change of Venue:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1651(a), the All Writs Statute:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Late in the afternoon of January 11, 1967, while the trial was in progress with a witness on the stand, the Fourth Circuit Court of Appeals advised District Judge Watkins by telephone of its writ of mandamus directing "transfer" of Civil Action 12,932 from the District of Maryland to the Northern District of Ohio. Trial proceedings which began almost three years before, on April 15, 1964, abruptly terminated at page 38,299 of the record.

It is that action of the Fourth Circuit which this petition presents for review.

Civil Action 12,932 is a long and complex patent case, three aspects of which have earlier been the subject of unsuccessful mandamus proceedings instituted by Respondent General Tire and Rubber Company

resulting in certiorari petitions in this Court. But the facts relevant to the questions here presented may be quickly stated.

Civil Action 12,932 was filed in the Maryland District Court on March 30, 1961, by The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company seeking a declaration that United States patent 2,964,083, owned by the General Tire & Rubber Company is invalid and not infringed. The declaratory judgment action was precipitated by General's threats to institute infringement litigation against Firestone and McCreary after infringement suits were brought by General in Ohio against Goodyear Tire & Rubber Company and U. S. Rubber Company on December 13, 1960, the day the patent issued.[1]

A pretrial motion by defendant General to transfer Civil Action 12,932 from Maryland to Ohio was filed April 13, 1961 and denied by Judge Watkins on July 6, 1961. As he later explained it, the denial was based on the finding that "the District of Maryland seemed to be the forum conveniens."[2] No appellate review was sought.

On September 6, 1963, General renewed its motion to transfer, alleging a change in conditions as to the convenience of the parties and witnesses and empha-

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[1] McCreary, acting wholly independently of Firestone, settled its Maryland litigation with General on July 18, 1966.

In Cleveland, Goodyear Tire and Rubber Company settled with General on February 9, 1966, while the third mandamus arising out of Civil Action 12,932 was pending before the Fourth Circuit.

[2] The quotation is from the opinion of Judge Watkins denying the renewed transfer motion on October 14, 1963 included in the record certified to this Court in No. 878, O.T. 1964.

sizing the "judicial economy" of a single trial in Ohio. Judge Watkins denied the renewed motion on October 14, 1963, stating that he was "completely unconvinced that a transfer would really conserve judicial manpower." He added that apparently the Baltimore case "set firmly for trial on January 7, 1964 in this court will be reached, and (hopefully) will be decided before the Cleveland cases, which *may* be set for trial in April 1964, if the parties are then ready for trial." [3]

General thereupon brought a mandamus action in the Fourth Circuit to compel Judge Watkins to transfer the case to Cleveland, pursuant to the transfer statute, 28 U.S.C. § 1404(a). The Fourth Circuit denied the petition for mandamus *solely* on the following grounds (*General Tire & Rubber Company* v. *Watkins*, 326 F. 2d 926, 929):

> " . . . Reserving the question as to under exactly what circumstances this court would issue a mandamus to compel a transfer, *Cf.* Morehead v. Barksdale, 263 F. 2d 117 (4 Cir. 1959), we have no hesitation in saying that on the state of this record we will not issue a mandamus here. There is no evidence that the Ohio cases can be reached at a definite time in the future, whereas this case is set for a firm date early next year. The court is thoroughly familiar with the issues. More than 25,000 pages of depositions and 18,000 pages of exhibits are in the record. Plaintiffs have been required to answer over 600 interrogatories. This work has proceeded under ground rules laid down by the district judge [Judge Watkins], who in ten full days of hearing must have acquired familiarity with the details

[3] The quotation is from the opinion of Judge Watkins denying the renewed transfer motion on October 14, 1963 included in the record certified to this Court in No. 878, O.T. 1964.

of the case. Under these circumstances the petition will be Denied."[4]

Thereafter, on April 20, 1964, this Court denied General's petition for certiorari to review this action by the Fourth Circuit. 377 U.S. 909.

Following a belated attempt by General to secure a jury trial,[5] the actual trial of the declaratory judgment action commenced before Judge Watkins in Baltimore on April 15, 1964, and continued thereafter on a four-day-per-week schedule.

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[4] In refusing mandamus in 1964 *before* the trial had even started, the appellate court joined Judge Watkins in rejecting as a ground for transfer the very "convenience" and "forum shopping" arguments which it has now found significant after almost three years of trial. See Appendix A, *infra*, p. 17a.

As a *nunc pro tunc* prerequisite to its *de novo* determination that

> ". . . the subsequent settlement with McCreary on July 18, 1966, further strengthens the case for transfer at this time." (Appendix A, *infra*, p. 14a)

the Fourth Circuit, in the 1967 opinion, stated that its January 1964 decision denying transfer

> ". . . was premised upon two principal factors: (1) that McCreary Tire and Rubber Company, the customer of Firestone, was an independent coequal party plaintiff against whom alone a patent suit could not be brought in Ohio for reasons of venue . . ." (Appendix A, *infra*, pp. 2a-3a)

But the 1964 opinion denying transfer is exclusively posited on other grounds.

[5] Judge Watkins' denial of the jury trial request led to a second mandamus proceeding in the Fourth Circuit. On March 31, 1964, the Fourth Circuit denied General's petition for mandamus and affirmed the refusal to grant a jury trial. *General Tire & Rubber Company* v. *Watkins*, 331 F. 2d 192. Certiorari was denied on June 1, 1964 by this Court. 377 U.S. 952.

Nearly two years later, the trial having proceeded without interruption save for occasional recesses, General filed a third mandamus action in the Fourth Circuit seeking an order disqualifying Judge Watkins from further participation in the case by virtue of 28 U.S.C. § 455—concededly a further step in General's crusade "to have this case in one way or another consolidated with the Cleveland case and tried there".[6] In dismissing the petition and finding no impropriety whatever on Judge Watkins' part,[7] the Fourth Circuit commented (*General Tire & Rubber Company* v. *Watkins,* 363 F. 2d 87, 88):

> "The patent case finally came on for trial in the [Baltimore] District Court on April 15, 1964. Between that date and February 7, 1966, when the present application to disqualify the judge came on for oral argument in this court, the District Court had spent approximately four days per week in hearings; the transcript had grown to over 27,000 pages, including over 1500 exhibits; several key witnesses had died, and it was questionable whether several other witnesses would still be available."

Thereafter, in acceptance of the Fourth Circuit's suggestion (363 F. 2d at 89-90) that any claim of fraud in the inducement of the denials of the prior transfer motions should first be presented to the District Court, General, on June 28, 1966, filed in the Dis-

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[6] The quotation is from remarks of Mr. Merriam, counsel for General, made November 18, 1965 when the first steps to precipitate the third or "disqualification" mandamus were taken. It appears at page 25,806 of the trial record and at page 97 of the "Appendix to Brief of Intervenor" below.

[7] This Court denied certiorari on October 17, 1966 with respect to the Fourth Circuit's dismissal of the third mandamus motion. 385 U.S. 899.

trict Court a "Renewed Motion to Transfer and Motion for Imposition of Sanctions and Assessment of Attorney Fees and Expenses". The sole premise of this renewed motion was the charge that certain fraudulent misrepresentations had been made by Firestone and McCreary which had misled Judge Watkins in connection with his denial of the earlier transfer motions. No claim was made and no evidence was offered that there had been any change in circumstances respecting the convenience of parties or witnesses or the interest of justice which would dictate any different disposition now of the transfer motion. Transfer, in short, was sought solely as a sanction for the alleged fraud and misrepresentation which General charged had earlier been practiced on the trial court.

"In a long and meticulous memorandum opinion filed . . . on October 17, 1966 . . . [Appendix B, *infra*, pp. 22a-42a] [Judge Watkins] reviewed the evidence concerning General's charges and found with Firestone on all points." See Appendix A, *infra*, p. 13a. He specifically found that no fraud had been practiced on the court and that no efforts to practice fraud had been made.[8]

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[8] At the conclusion of his opinion, Judge Watkins made six "general and ultimate" "Findings of Fact", including the following:

> "1. McCreary was an independent party throughout the entire period herein involved and still is an independent party.
>
> "2. McCreary agreed to and in fact did bear its proportionate share of the cost of litigation.
>
> * * * * * * *
>
> "5. No fraud, serious or otherwise, has been practiced upon the Court by the plaintiffs.
>
> "6. There has been no effort by plaintiffs to practice fraud upon the Court."

General immediately filed a fourth mandamus petition in the Fourth Circuit—this one seeking to obtain an order directing Judge Watkins to dismiss the complaint or to transfer the action to the Northern District of Ohio. The entire petition concerned itself with the alleged fraud and misrepresentation, detailing General's contentions that the District Court had been deceived by Firestone.[9] The only reference to the requested transfer in the body of the petition was as an alternative sanction for the fraud, should the Fourth Circuit overrule Judge Watkins' findings and determine for itself that fraud had in fact been practiced. As stated at page 18 of the petition:

> "If this Court finds that a fraud has been practiced on the District Court, the next question is whether this entitled General Tire to the relief requested. . . . General's contention is that under

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On the basis of these findings, Judge Watkins concluded as a matter of law:

> "3. The renewed motions of April 13, 1961 to dismiss or transfer, of September 6, 1963 to transfer, and the motion for the imposition of sanctions, are each and all without merit, and should be and are denied." (Appendix B, *infra*, pp. 41a-42a).

[9] The "Questions Presented" by the petition filed in the Fourth Circuit were three in number:

> "1. Whether the representations made by Firestone to the District Court, which representations are set out at pages 5 to 8 of this brief, when considered in view of the telephone transcript of May 9, 1961, constituted a fraud practiced or attempted upon the District Court.
>
> "2. Whether, if such fraud has been practiced upon the District Court, General Tire is entitled in law and equity to have Civil Action 12,932 dismissed or transferred to Ohio.
>
> "3. Whether General Tire is entitled to an assessment against Firestone for its attorneys fees and expenses incurred in prosecuting Civil Action 12,932."

> the doctrine of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), it is clearly entitled to the relief asked for in its original transfer motion. That is, either the declaratory judgment complaint should be dismissed or the counterclaim should be transferred to Ohio, or both. Whatever the means, it is clear that the judgment denying transfer must be 'devitalized.' See *Hazel-Atlas*, at 245."

No facts were alleged, no claim or argument was made, to the effect that "the convenience of parties and witnesses, in the interest of justice," as mentioned in 28 U.S.C. § 1404(a), dictated a transfer of the declaratory judgment case long after the trial thereof had commenced. Transfer, in short, was sought solely as an alternative penalty for the alleged fraud.

The Fourth Circuit, sitting *en banc*, set forth in detail the facts that General alleged to be indicative of the fraud. But the court then stated that "We do not feel it advisable at this stage of the lawsuit to pass on the district court's findings and conclusions with respect to General's contentions of bad faith and misrepresentation to the court. . . . we think that their resolution in favor of Firestone should not have been determinative of the motion to transfer. Indeed we think the court's preoccupation therewith caused it to overlook completely the factor which should have controlled the decision. That factor was the complete change of conditions which had taken place since the motion was originally denied. This failure resulted in an order which constituted an abuse of discretion." Appendix A, *infra*, pp. 13a-14a.

The Fourth Circuit then proceeded to elaborate upon the "change of conditions" which warranted a trans-

fer to the Northern District of Ohio. Disregarding General's sole claim that transfer was required as an alternative sanction for the alleged fraud, the court ruled that its concern with "the effective administration and supervision of the courts of our circuit" made the transfer mandatory. None of the factors found controlling by the court, however, had been the subject of any evidence, claim or argument by any of the parties in the mandamus proceeding.

The Fourth Circuit's opinion "reversed" the order of the District Court, and on the following day there was entered a formal order granting the petition for a writ of mandamus and ordering and directing Judge Watkins to vacate his order of September 26, 1966, denying the renewed motion to transfer or in the alternative to dismiss the suit and "to enter an order directing the transfer of the said civil action to the said District Court for the Northern District of Ohio". Appendix A, *infra,* p. 19a. This order was by its terms conditioned upon the Fourth Circuit's own unanimous opinion "that the case should be transferred to the United States District Court for the Northern District of Ohio, Eastern Division."

REASONS FOR GRANTING THE WRIT

The decision below presents questions of extraordinary significance in the administration of the federal court system. Basically at stake is the reincarnation of a problem which should have been put to rest by this Court in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240—*i.e.,* whether a federal appellate court is empowered to make its own *de novo* examination of the factors relevant to the transfer of a case from one federal district court to another and thereupon to order

the transfer on the basis of a factor not urged before or considered by the trial judge.

Here the Fourth Circuit has sought to exercise the very transfer power which the *Platt* decision held to be beyond its jurisdictional ambit. And it has done so in a manner and under circumstances creating far more serious problems for courts and litigants than were involved or foreseen in *Platt*. To order the transfer of a complex federal court trial, more than two and a half years after its commencement, is to bring into question a host of practical and policy considerations under the transfer statute, 28 U.S.C. § 1404(a). And when the transfer is ordered upon the basis of "effective administration and supervision of the courts of our circuit," a basis never considered by the trial court nor urged upon the appellate court, elemental questions of procedural fairness and abuse of appellate power under the All Writs Statute, 28 U.S.C. § 1651(a), are brought into being.

The combination of the many and varied problems arising from the Fourth Circuit's patent disregard of the *Platt* ruling is such as to raise the ultimate question whether the Fourth Circuit's departure from the accepted and usual course of appellate proceedings justifies the summary and swift exercise of this Court's power of supervision and correction. The "effective administration and supervision of the courts of . . . [the Fourth] circuit" may well demand an immediate resumption of the instant trial in Baltimore.

1. The Fourth Circuit's Order Directing the Transfer of This Case to the Northern District of Ohio Is in Complete Conflict With This Court's Decision in Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240

In *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, this Court unanimously ruled that a federal court of appeals has no power to utilize a writ of mandamus to order the transfer of a multi-venue criminal prosecution from one district to another based upon the appellate court's own *de novo* examination of the record. Rule 21(b) of the Federal Rules of Criminal Procedure, the Court noted, committed to the trial judge the discretionary function of ordering such a transfer based upon an assessment of the appropriate criteria. "The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand . . ." 376 U.S. at 245. Here, however, the court of appeals disregarded the sole ground for transfer urged before it and the trial judge, *sua sponte* substituted a new and largely unsupported ground of its own choice, and on a *de novo* determination of the applicability of such new ground exercised the discretionary function which the statute commits in the first instance to the district court by issuing a writ of mandamus ordering transfer in the midst of trial.

In this case and without citing or attempting to distinguish the *Platt* decision, the Fourth Circuit has undertaken to do precisely what the *Platt* case determined it could not do. After finding abuse of discretion consequent from failure of the district court

to consider and rest its decision upon a ground never urged before it—the new ground being an alleged "complete change of conditions which have taken place since the [transfer] motion was originally denied"—the Fourth Circuit proceeded to formulate a new criterion for transfer—"the effective administration and supervision of the courts of our circuit." But instead of remanding the matter to the District Court to consider the advisability of ordering a transfer in light of the new criterion, as *Platt* requires, the Fourth Circuit made its own *de novo* factual determinations and made its own conclusion that a transfer was necessary in terms of the new criterion and on the basis of "facts" of its own choice largely unsupported by the record.

It is the Fourth Circuit on its own motion, not the District Court for the District of Maryland, that has determined that the changed circumstances of the Maryland and Ohio lawsuits and the conveniences of the parties and witnesses are such as to make the transfer essential as a matter of proper judicial administration.

Thus the action here taken by the Fourth Circuit is completely inconsistent with *Platt*, and outside the scope of appellate power as defined by this Court in the *Platt* case. And the inconsistently with *Platt* is nonetheless total by virtue of the fact that the instant case involves the transfer of a civil action, in contrast to the criminal action sought to be transferred in *Platt*. Like Rule 21(b) of the Federal Rules of Criminal Procedure with respect to the transfer of multivenue prosecutions, 28 U.S.C. § 1404(a) commits to the trial judge the discretionary function of determining when to transfer "any civil action" in

the light of appropriate criteria.[10] The restrictions on the appellate function with respect to such transfers, as defined in *Platt,* would plainly be the same in both the criminal and the civil context.

The grant of certiorari is therefore appropriate to give effect to the controlling impact of the *Platt* case. There is an obvious need for this Court to make clear that the *Platt* limitations on the appellate function apply to civil as well as criminal transfer matters.[11]

2. The Fourth Circuit's Issuance of a Writ of Mandamus on Grounds Not Advanced or Argued Before It and Not Considered by the Trial Court Raises Serious Problems Under the All Writs Statute, 28 U.S.C. § 1651(a)

In purporting to exercise its broad power under the All Writs Statute, 28 U.S.C. § 1651(a), to issue a writ of mandamus, the Fourth Circuit has created several important problems under that statute which deserve the attention and consideration of this Court.

Basically, the Fourth Circuit had before it a petition for a writ of mandamus to compel Judge Watkins to

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[10] Rule 21(b) provides that the "court upon motion of the defendant shall transfer the proceeding as to him to another district or division . . . if the court is satisfied that in the interest of justice the proceeding should be transferred . . ."

Under 28 U.S.C. § 1404(a), "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[11] The instant case presents none of the "extraordinary circumstances" which were present in *Koehring Co.* v. *Hyde Constr. Co.,* 382 U.S. 362, and which led this Court to rule that § 1404(a) does not preclude "an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order." The unusual circumstances in *Koehring* involved the refusal of a district court to comply with an earlier mandate of the Fifth Circuit to transfer the case.

impose sanctions upon the petitioner for having committed an alleged fraud upon the trial court at the time of the denial of the earlier, pretrial transfer motions. The question as to this alleged fraud had also been the focal point of the proceedings before Judge Watkins which led to the mandamus effort. And his findings that no such fraud had even been attempted became the subject matter of the mandamus petition in the Fourth Circuit. The mandamus effort, in short, sought a reversal of Judge Watkins' findings as to the absence of any fraud. As the mandamus petition itself stated (page 18), only if the Fourth Circuit should itself then find "that a fraud has been practiced on the District Court" would it become pertinent to determine the kind of relief necessary to devitalize the fraud. The relief requested was either a dismissal of the declaratory judgment action or the transfer of the proceedings to Cleveland.

In granting the petition for writ of mandamus, the Fourth Circuit refused to consider two vital factors before it: (a) after detailing at length the allegations of fraud, the Fourth Circuit stated that it was not "advisable at this stage in the lawsuit to pass on the district court's findings and conclusions with respect to General's contentions of bad faith and misrepresentation to the court"; and (b) the Fourth Circuit ignored petitioner Firestone's motion to dismiss the mandamus petition on the ground that findings as to fraud cannot be reviewed by the extraordinary writ of mandamus. See *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 255; *Parr* v. *United States*, 351 U.S. 513, 520. Instead, the Fourth Circuit seized upon one of the alternative sanctions suggested had the fraud findings been reversed, the sanction of transferring the case to

Ohio. It then proceeded outside the lawful exercise of its prescribed jurisdiction to convert the mandamus petition into a vehicle for a full-scale *de novo* consideration of transferring the case in the interest of the "effective administration and supervision of the courts of our circuit."

One result of this *sua sponte,* unanticipated usurpation of judicial power was to deprive all parties before the Fourth Circuit of the opportunity to present and to evaluate the facts and considerations relevant to the transfer order entered by the Fourth Circuit.

In *Swindell-Dressler Corporation* v. *Dumbauld,* 308 F. 2d 267 (C.A. 3), with which the decision below conflicts in principle, the Third Circuit flatly rejected an analogous usurpation of prerogative by the trial judge, stating:

> "But quite aside from the foregoing, no notice, hearing or opportunity to be heard as to transfer under Section 1404(a) was afforded Swindell prior to the order of transfer of December 14, 1961. In denying Swindell any hearing or opportunity for hearing the court below denied it procedural due process of law guaranteed to it by the Fifth Amendment. . . . The plain and unsubtle fact which is paramount here is that there was no notice or hearing before the order of December 14, 1961, purporting to effect the transfer . . . was entered." 308 F. 2d 267, 273-274.

Likewise in this case, "the plain and unsubtle fact which is paramount" is that there was no notice or hearing with respect to the grounds on which the mandamus was based before the writ commanding trans-

fer was filed by the Fourth Circuit on January 12, 1967.[12]

In this case, where their arguments were necessarily confined to the challenge to the trial court's findings that there had been no fraud, the parties had no occasion or notice to submit facts and arguments directed to any change in the trial conditions since the denial of the original transfer motions. No opportunity was afforded the parties to comment upon the promulgation of the new standard under § 1404(a) relative to the effective administration of courts within the Fourth Circuit or to present any facts relevant thereto. Not even Judge Watkins ever had an opportunity to consider or resolve the matters that became decisive in the issuance of the mandamus writ.

Among matters considered *de novo* in the opinion below, concerning which neither the parties nor the trial judge were given notice or opportunity to be heard, are the following: (1) the alleged March 1, 1967 trial date for the U. S. Rubber case in Ohio;[13] (2) the findings as to "convenience" with respect to the Ohio locale of the corporate parties and of the docu-

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[12] On or about January 16, 1967, Intervenor Firestone sought a stay of execution of the writ of mandamus "for thirty days in order that the Intervenor may have an opportunity to prepare and file in the Supreme Court of the United States a Petition for a Writ of Certiorari, a Petition for a Writ of *Mandamus*, or both . . .". The Court of Appeals granted the stay *only* to ". . . apply to the Supreme Court of the United States for a writ of *certiorari* to this Court." (Appendix A, *infra*, p. 21a).

[13] While the March 1 trial date is referred to in the "Petitioner's Reply Brief" and was mentioned on the trial record prior to the mandamus proceeding, it was never urged as a ground for transfer.

ments and witnesses, as to which it is said "Firestone has made no serious argument to the contrary", and the findings as to forum shopping;[14] (3) the findings that the Cleveland forum is "equally convenient", that Maryland "no longer" offers "any convenience" to Firestone, and that the rights of Firestone as a private party "in any event will not be impaired in the least by transfer";[15] (4) the finding that General's Ohio case against U. S. Rubber cannot be moved to Mary-

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[14] See discussion of these appellate findings in footnote 21, p. 25, *infra*. These are the very findings which were rejected by Judge Watkins in his denial of the original and renewed transfer motions on July 6, 1961 and October 14, 1963. These same arguments were rejected by the Court of Appeals in its opinion on the transfer mandamus, 326 F. 2d 926 at 929. They were not again raised when the transfer motions were renewed on June 28, 1966 on the ground of fraud. Firestone "made no serious argument to the contrary" because it was never given an opportunity to do so.

[15] These findings totally overlook the necessity to retry the entire case in the Ohio court or, alternatively, to impose upon the Ohio judge the impossible task of familiarizing himself with two and one-half years of trial record and three years of pretrial proceedings. As the opinion below tacitly concedes, the practical effect of mandamus is dismissal—not transfer. Firestone has an unquestioned right to a fair hearing, the preservation of the Baltimore record and a disposition of its case by Judge Watkins before whom that record was made—a right which is obviously impaired by the transfer order. Yet this clearly erroneous "finding" was essential to the court's futile attempt to distinguish the directly conflicting decision of the First Circuit in *In re Josephson*, 218 F. 2d 174 (C.A. 1), Appendix A, *infra*, p. 18a.

land—a finding inconsistent with the record;[16] and (5) the unsupported presumptions as to consolidation of the Firestone case with the U. S. Rubber case in Cleveland.

The inevitable consequence of the Fourth Circuit's *sua sponte* direction to transfer this case to Ohio was to deprive the parties of a fair hearing on that issue and to force this Court to become the only tribunal capable of providing some form of review of the basic findings as to the advisability of transfer. Such action creates most serious problems as to the fair exercise of appellate power under § 1651(a). And such action further underscores the wisdom of this Court's admonition in the *Platt* case that courts of appeals should not attempt to act *de novo* on transfer matters. Appellate courts are not equipped to treat with such matters in the first instance, gathering the evidence and performing the discretionary function which Congress has given to the trial courts. In the exercise of this Court's supervisory power over the administration of justice in the federal court system, the decision below should be reviewed and the *sua sponte* transfer command of the Fourth Circuit vacated.

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[16] In its decision on the second (jury trial) mandamus, 331 F. 2d 192, the Fourth Circuit itself referred to the fact that U.S. Rubber in May of 1964 affirmatively moved in Ohio to transfer that litigation to Baltimore. The transfer motion made it clear that the venue prerequisites of 28 U.S.C. 1400(b) were satisfied in Maryland as to U. S. Rubber such that the contemplated transfer could be effected. Papers relevant to the U. S. Rubber transfer motion are attached to the "Application for Stay of the Trial of Civil Action 12,932 in the District of Maryland" addressed by General to the Chief Justice on April 1, 1964, incident to No. 878, O.T. 1964. As these papers reflect, the motion to transfer was withdrawn because Judge Watkins determined that consolidation in Maryland would be infeasible, even before the trial began, in view of the wide disparity in the state of trial preparation between the two cases.

3. The Fourth Circuit's Direction That This Case Be Transferred in the Midst of a Long and Complex Trial Is Inconsistent With the Policy and Purpose of 28 U.S.C. § 1404(a)

This Court's review of the action below is further warranted by virtue of the important and novel problems arising out of the Fourth Circuit's command that this case be transferred almost three years after commencement of trial.

Quite aside from the question whether, under the circumstances here present, a court of appeals can itself direct a transfer, a significant question is here posed whether 28 U.S.C. § 1404(a), which governs the transfer of civil actions, empowers any kind of a transfer after a trial has progressed as far as this one has. While the language of § 1404(a) sets no time limit on when a transfer may be made, there appears to be no recorded instance prior to the command below where a federal civil action was ordered transferred after the commencement and prior to the completion of a trial.[17]

Indeed, the entire thrust of § 1404(a) is directed at transfers prior to the commencement of the trial of a case. The Congressional standard of weighing "the convenience of parties and witnesses, in the interest of justice," as a basis for resolving transfer motions, is one that makes sense only when applied prospectively. A court can intelligently weigh the relative conveniences and interests as between two possible trial sites only prior to the commencement of trial.

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[17] There are three federal court decisions dealing with transfers after a trial has been concluded, but the transfers were all in connection with a subsequent retrial or new and further proceedings. See *Sypert* v. *Miner*, 266 F. 2d 196 (C.A. 7); *United States* v. *Swift & Co.*, 158 F. Supp. 551 (D.C.D.C.); *Adler* v. *McKee*, 92 F. Supp. 613 (S.D.N.Y.).

Once a trial starts, and witnesses begin to testify, the supposed inconveniences become moot and any error in not having transferred the case becomes harmless, at least in the absence of unusual prejudice to one of the parties. See *Whittier* v. *Emmet,* 281 F. 2d 24, 30-31 (App. D.C.).[18]

Moreover, the longer a trial progresses the greater becomes the sheer waste of the time and energies of the witnesses, the parties and the trial judge upon a transfer in the midst of trial. No more dramatic illustration of such inequitable consequences could be devised than that afforded by this case. To direct the transfer of the Maryland case after three years of pretrial activities and more than two and a half years after the trial itself has been underway means (1) a waste of Judge Watkins' time during the pretrial stages of the litigation and in having presided at this long trial and the loss of all the impressions he has formed of the witnesses and the rulings he has made as to the evidence, including the benefits of certain on-site inspections he has made; (2) a waste of the efforts and inconveniences already undergone by the many witnesses; (3) the complete loss of the testimony of those witnesses who have since died or who are otherwise unavailable for further testimony; (4) the waste entailed in disregarding the thousands of documents painstakingly collected in Baltimore and introduced into the record; and (5) the loss of the attorneys' efforts and time and the waste of the heavy expenses incurred by the liti-

[18] In the *Whittier* case, Mr. Justice Burton, sitting by designation, wrote: "Venue is primarily designed to protect defendants from inconvenient forums and courts from inconvenient lawsuits. Once the case has been heard fully and fairly on the merits, the reasons for reversing the judgment on grounds of improper venue are substantially diminished in the absence of prejudice to a party who has preserved his standing to complain by timely objection." 281 F. 2d at 30.

gants in the creation of the massive pretrial and trial record. And upon the transfer of this case to Cleveland, as the Fourth Circuit has ordered, either the suit would have to be retried or a new judge would be faced with the nigh-impossible task of absorbing a 38,000-page record, with its thousands of exhibits, and recreating the countless impressions already formed by Judge Watkins.[19] To say, as the Fourth Circuit has said, that to send this case to Cleveland and to consolidate it with the pending suit against U. S. Rubber is "the only way in which time and effort can now be saved" is sheer nonsense.

The unsupported presumptions of consolidation which formed the major prop of the Fourth Circuit's projection of judicial economy are pure speculation. As District Judge Wood wrote in *Popkin* v. *Eastern Air Lines*, 253 F. Supp. 244 (E.D. Pa.), refusing transfer following the remand from this Court in *Van Dusen* v. *Barrack*, 376 U.S. 612:

> "We obviously have no power to compel consolidation of these cases with those in Boston. Swindell-Dressler Corp. v. Dumbauld, 308 F. 2d 267, 273 (3 Cir. 1962). This is a matter in the discretion of the District Court of Massachusetts, and we have no indications that it would consolidate. We have no power further to order that

[19] The Fourth Circuit conceded that as "Against the judicial time and effort already spent on the Maryland case must be weighed the fact that the Ohio judge either has been, or will have to be, 'educated' in much of the same factual background whether or not the Ohio case against Firestone can be consolidated with its companion case against U. S. Rubber." (Appendix A, *infra*, p. 14a). But the weight of that balance would seem clearly on the side of preserving "the judicial time and effort already spent on the Maryland case." If the patent is invalid in Maryland, General would have no right to a second trial in Ohio in any event. *Nickerson* v. *Pep Boys—Manny, Moe and Jack*, 247 F. Supp. 221 (D. Del. 1965).

District how to try these cases. . . . " 253 F. Supp. 244, 249.

Should consolidation prove impossible or should the judge of the Northern District of Ohio refuse to order or permit consolidation, the premise of "judicial economy" upon which the decision below is posited totally fails. Nor is the result materially different even if consolidation is permitted. The vast time and effort which would be required for the Ohio judge to absorb, interrelate, and give effect to what has already transpired in Baltimore—even if it could be done—would certainly constitute a useless duplication of effort. And without the hoped-for consolidation the transferred action may well go to the bottom of the Cleveland docket to await a trial call several years hence.

So grievous are these inequities and these litigation wastes as to reinforce an interpretation of § 1404(a) that would prohibit a transfer after a trial has progressed as far as this one has. At this juncture of a case, the Fourth Circuit having acknowledged that the trial will likely come to an end within a matter of a few months, the transfer standards set forth in § 1404(a) lose all their meaningfulness. Thus the criterion of "the convenience of parties and witnesses" is now moot as to the parties themselves[20] and

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[20] Thus the Fourth Circuit's statement that both parties here are Ohio corporations with main offices in that state has no relevance to the fact that these corporations, which are worldwide in their operations, have already participated in the Baltimore trial for the past two and a half years without undue inconvenience or any claim or showing of prejudice. Moreover, the fact that a corporate party has its main office or "home" in a particular state "has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel." *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245-246.

as to the witnesses who have already testified.[21] The "interest of justice" concept of § 1404(a), in light of the complete waste of all the elements that have gone into the creation of the Baltimore trial record, can scarcely be considered advanced by ordering a transfer at this late date.

The effort of the Fourth Circuit to create a new standard for resolving transfer motions—the interest in the "effective administration and supervision of the courts of our circuit"—accordingly becomes highly questionable in the context of this case and under the standards set forth in § 1404(a). What administrative concern of the Fourth Circuit, in derogation of the convenience of parties and witnesses and the interest of justice, justifies the destruction of a two-and-a-half-year trial record and the imposition on the Sixth Circuit of the responsibility for picking up the shattered remains? If the Fourth Circuit is dissatisfied with the progress or speed of the instant trial, what administrative concern permits the impact of that dissatisfaction to fall upon the parties to the litigation by forcing them to start all over in another tribunal? And the Fourth Circuit's apparent disapproval of petitioner's so-called

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[21] The Fourth Circuit's further remark that "many if not most of the documents and witnesses" are in Ohio disregards the following facts: (a) virtually all of the existing documents known to be present are now and for many months have been physically present in Baltimore in offices rented by the parties for the duration of the trial; (b) over 2,200 of these documents have already been introduced into the record, albeit approximately 1100 are marked only for identification pending rulings by Judge Watkins on their admissibility into evidence; (c) these marked documents are now physically stored in the federal court building in Baltimore; and (d) large numbers of the witnesses have already testified in Baltimore and but three of the remaining 17 witnesses which Firestone intends to call actually reside in Ohio.

"forum shopping"—an argument flatly rejected prior to trial by Judge Watkins and the appellate court alike—seems irrelevant after the trial has been underway over two and a half years and is nearing completion; indeed, to permit or direct a transfer at this stage is to encourage "forum shopping" by the dissatisfied litigant who feels unhappy with the trial judge or the progress of the trial itself.[22]

All of these problems are of more than ordinary significance in the interpretation and application of § 1404(a). If allowed to stand unchallenged and unreviewed, the Fourth Circuit's decision will constitute a most dangerous and unsatisfactory precedent for further efforts to disrupt federal court trials by those litigants and judges who become displeased with the speed or the progress of a given proceeding. This Court should determine the efficacy of such efforts in the light of the specific commands of Congress in § 1404(a).

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[22] State courts have uniformly rejected efforts to transfer a case after commencement of trial on grounds that the trial judge is biased and prejudiced, grounds that usually entitle a litigant to a change of venue as a matter of right. Denial of such efforts is grounded on the theory of precluding "counsel from first ascertaining the attitude of the trial judge on a hearing relating to some of the issues in the case and then, if the court's judgment should not be in harmony with counsel's theory, asserting the prejudice of the court as ground for allowing a change of venue." *Roherty* v. *Green*, 57 Ill. App. 2d 362, 206 N.E. 2d 756, 759. See also *Easter* v. *Dundalk Holding Co.*, 233 Md. 174, 195 A. 2d 682, 685; *State* v. *Lehman*, 182 Mo. 424, 81 S.W. 1118, 1123; *Anderson* v. *Mammoth Min. Co.*, 26 Utah 357, 73 P. 412.

4. The Fourth Circuit's Use of Mandamus To Review an Alleged Abuse of the District Court's Discretion in Denying Transfer Is in Conflict With the Practice of Other Circuits and Represents an Important and Recurring Appellate Problem

A significant and recurring problem and one that has led to sharp conflict among the circuits is presented by the action of the Fourth Circuit in utilizing the extraordinary writ of mandamus to review the district court's action refusing transfer.

As early as 1959, in its decision in *Morehead* v. *Barksdale,* 263 F. 2d 117, the Fourth Circuit, speaking through Judge Sobeloff, stated:

> ". . . The power of the Courts of Appeals to review unappealable interlocutory orders, by use of mandamus, has been a subject of conflict among the circuits. Where a District Judge has granted or denied transfer of a civil action to another district under 28 U.S.C.A. § 1404(a), some courts have held that they are without jurisdiction to review such an interlocutory order, Clayton v. Warlick, 4 Cir., 1956, 232 F. 2d 699; All States Freight v. Modarelli, 3 Cir., 1952, 196 F. 2d 1010; Great Northern Railway Company v. Hyde, 8 Cir., 1956, 238 F. 2d 852 reargued and reaffirmed, 8 Cir., 1957, 245 F. 2d 537; but others have granted review on the theory that any error in this type of interlocutory order would probably be incorrectible on appeal, Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329; Wiren v. Laws, 1951, 90 U.S. App. D.C. 105, 194 F. 2d 873; Atlantic Coast Line R. Co. v. Davis, 5 Cir., 1950, 185 F. 2d 766." 263 F. 2d 117, 118.

But any mere listing of conflicting precedent serves only to obscure the total confusion and uncertainty now rampant in the appellate courts.

In its 1967 opinion in this case, the Fourth Circuit *sub silentio* overruled its prior decision in *Clayton* v. *Warlick,* 232 F. 2d 699, cited in *Morehead, supra.*

With somewhat greater candor but equal vacillation, the Eighth Circuit first held, and then reaffirmed, that mandamus did not lie to review a discretionary transfer order. *Great Northern Railway Company* v. *Hyde,* 238 F. 2d 852 (1956), reargued and reaffirmed 245 F. 2d 537 (1957). But in 1965 *Great Northern Railway* was overruled by the *en banc* decision in *McGraw-Edison Co.* v. *Van Pelt,* 350 F. 2d 361.[23]

The present state of the conflict—and the uncertainty concerning the propriety of review of discretionary transfer rulings, whether by interlocutory appeal or by mandamus, is reflected by the detailed 1966 opinion in *A Olinick & Sons* v. *Dempster Brothers, Inc.,* 365 F. 2d 439, in which the Second Circuit stated that it has never overturned a district court's transfer ruling on grounds of abuse of discretion although seemingly reserving the right to do so.

The view that mandamus does not lie to inquire into the district court's discretion in refusing or denying transfer—a view in conflict with the decision below and with the apposite decisions in at least the Second, Sixth and Eighth Circuits—is illustrated by the deci-

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[23] In *Great Northern Railway Company* the Eighth Circuit stated:

> "It is unfortunate that the question of the reviewability of a transfer order under § 1651(a) has not yet been put at rest. The Supreme Court, in Norwood v. Kirkpatrick, 349 U.S. 29, 33, 75 S.Ct. 544, 99 L.Ed. 789, found it unnecessary to determine whether mandamus or prohibition was a proper remedy to test the validity of a transfer order. The instant case squarely presents that question and it would seem to be an appropriate case in which to apply for certiorari." 238 F.2d 852, 857.

sion of the First Circuit in *In re Josephson,* 218 F. 2d 174, 183, of the Third Circuit in *All States Freight* v. *Modarelli,* 196 F. 2d 1010, and of the District of Columbia Circuit in *Loew's Inc. et al.* v. *McGuire,* 205 F. 2d 719.

These conflicting views stem from the fact that traditionally the limited function of a writ of mandamus is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26. Mandamus cannot be used, this Court has said, "to actually control the decision of the trial court," *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379, 383, or "to compel the court below to decide a matter before it in a particular way," *In re Rice,* 155 U.S. 396, 403. On the other hand, the extreme difficulty of demonstrating after trial that any erroneous exercise of discretion by the trial court with respect to transfer was prejudicial [see *Scott* v. *United States,* 255 F. 2d 18 (C.A. 4); *Blumenfield* v. *United States,* 284 F. 2d 46 (C.A. 8)], has led to the feeling that interlocutory review by way of mandamus may be the only technique for meaningful review. But the difficulty of obtaining review after trial also suggests that such errors in denying transfer are not of sufficient importance to warrant use of the extraordinary writ of mandamus, particularly in view of the availability of review under the Interlocutory Appeals Act, 28 U.S.C. § 1292(b).[24]

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[24] But even as to § 1292(b), "The Courts of Appeals have been far from unanimous in deciding whether § 1292(b) is available to one seeking to review the disposition of a § 1404(a) transfer motion for erroneous evaluation of proper factors. The Fifth Circuit stoutly affirms that it is available, and that mandamus is accordingly inappropriate. . . . The Third and Sixth Circuits just as stoutly hold that it is not available." *A. Olinick & Sons* v. *Dempster Brothers, Inc.,* 365 F. 2d 439, 442 (C.A. 2).

This Court has yet to pass upon this perplexing problem. Without commenting on the propriety of mandamus, the Court has reviewed decisions in § 1404 (a) transfer cases which the courts of appeals have reviewed through exercise of the mandamus power. *Hoffman* v. *Blaski,* 363 U.S. 335; see also *Norwood* v. *Kirkpatrick,* 349 U.S. 29; *Ex parte Collett,* 337 U.S. 55. And in *Van Dusen* v. *Barrack,* 376 U.S. 612, 615, fn. 3, the Court took express note of its prior actions in this respect and declined to consider, under the circumstances there present, the Government's contention that mandamus is an improper mode of review of transfer matters.[25]

It therefore seems appropriate for the Court finally to establish the ground rules for the use of the extraordinary writ of mandamus in the review of transfer actions by district courts. The lower courts have floundered too long without the definitive guidance which only this Court can give.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted. Indeed, the petitioner suggests that consideration be given to the appropriateness of a summary reversal of the mandamus order of the Fourth Circuit. That order so far exceeds the bounds of appellate power as defined in *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240, as to warrant its

[25] In the *Platt* case, the Court noted that the Government did not challenge "the use of the extraordinary writ of mandamus as an appropriate means to review the refusal to transfer. We shall, therefore, not consider those matters here, assuming, without deciding, their validity for the purposes of this case." 376 U.S. at 244.

outright reversal. And only by such summary action by this Court can the Baltimore trial be resumed and concluded in the shortest possible time. The interests of prompt and efficient administration of this trial require its immediate resumption.

Alternatively, petitioner moves that this petition for writ of certiorari be treated as a petition for writ of mandamus and that the Fourth Circuit be directed forthwith to vacate its transfer order as being outside the scope of its appellate power. The Fourth Circuit's action, to borrow Mr. Justice Harlan's concurring words in the *Platt* case, 376 U.S. at 246, "inescapably contravenes accepted principles governing the exercise of appellate jurisdiction." That fact, combined with the gross inequities and inconveniences and waste of judicial time attendant upon a transfer ordered in the midst of a prolonged trial, dictates a drastic and immediate remedy.

Respectfully submitted,

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APPENDIX A

(Filed January 11, 1966)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,993.

THE GENERAL TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland, *Respondent.*

THE FIRESTONE TIRE & RUBBER COMPANY, *Intervenor.*

On Petition for a Writ of Mandamus.

(Argued December 5, 1966. Decided January 11, 1967.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, J. SPENCER BELL, WINTER and CRAVEN, Circuit Judges, sitting en banc.

Charles J. Merriam (Norman P. Ramsey; Frank J. Earnheart; Semmes, Bowen & Semmes, and Merriam, Marshall, Shapiro & Klose on brief) for Petitioner, and Edward S. Irons (Benjamin C. Howard, Mary Helen Sears, Gene W.

Stockman, Stanley M. Clark, Harold J. Birch, William W. Beckett, and Irons, Birch, Swindler & McKie on brief) for Intervenor.

BY THE COURT:

On April 13, 1961, the petitioner, General Tire and Rubber Company, filed a motion to transfer Civil Action No. 12,932, Firestone Tire & Rubber Co. v. General Tire & Rubber Co., now pending in the District of Maryland, to the United States District Court for the Northern District of Ohio, Eastern Division. On July 6, 1961, the district court denied the motion without prejudice to renew upon subsequent change of conditions. On September 6, 1963, the motion was renewed, and on October 14th of that year the district court again denied the motion. On January 7, 1964, this court declined to issue a writ of mandamus. On June 25, 1966, General again renewed its motion to transfer the case to the Northern District of Ohio or in the alternative to dismiss the action because of an attempt on the part of the plaintiff Firestone Tire and Rubber Company to practice a fraud against the court. General again seeks a mandamus directing the district court either to transfer the case to the Northern District of Ohio or in the alternative to dismiss.

We are unanimously of the opinion that the case should be transferred to the Northern District of Ohio in order to prevent an extravagantly wasteful and useless duplication of the time and effort of the federal courts by the simultaneous trial of two complex and elaborate cases involving substantially the same factual issues.

Our decision of January 1964[1] declining to issue the writ on the grounds that the record at that time did not disclose that the trial court had abused its discretion was

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[1] General Tire & Rubber Co. v. Watkins, 326 F. 2d 926.

premised upon two principal factors: (1) that McCreary Tire and Rubber Company, the customer of Firestone, was an independent coequal party plaintiff against whom alone a patent suit could not be brought in Ohio for reasons of venue, and (2) the plaintiffs and the court confidently predicted that the Maryland case would be reached and disposed of before trial of its sister cases could be started in Ohio. Three years later we again consider the case upon a renewal of the motion to transfer. McCreary is no longer a party, having changed counsel sometime after the death of Mr. McCreary, Sr., and settled with General Tire on July 18, 1966. In a colloquy engaged in by the remaining parties and the court on the record for the information of this court, the plaintiff Firestone and the court "hoped" that the case might be completed by September of 1967, although apparently further depositions to be taken abroad are contemplated. In a suit on the same patent against the United States Rubber Company in Ohio pretrial has been completed and that case set to commence on March 1, 1967. We are now faced with the fact that not only has the Maryland case failed promptly to settle the issues between the parties but on the contrary both suits will be in the process of trial simultaneously for at least nine months of the coming year involving the same patent and consequently many common issues of fact and law. A brief history of the action is necessary to understand the issues.

On December 13, 1960, General Tire and Rubber Company filed two separate suits against the Goodyear Tire and Rubber Company and the United States Rubber Company upon Patent #2,964,083 in the Northern District of Ohio. These suits were subsequently consolidated. At the same time it wrote Firestone and others offering licenses under the patent.

On March 17, 1961, a meeting was held among counsel for Goodyear, U. S. Rubber and Firestone at which the pos-

sibility of a declaratory judgment suit by Firestone was discussed.

On March 30, 1961, a telephone conversation took place between Mr. Irons, counsel for Firestone, and Mr. McCreary, Sr., relating to McCreary's becoming a party plaintiff in the declaratory judgment suit.

On March 30, 1961, the declaratory judgment suit was commenced in Maryland by Firestone Tire and Rubber Company and McCreary Tire and Rubber Company for a declaratory judgment of invalidity and non-infringement of the same patent as that involved in the Ohio suits.

On April 4th and 6th, 1961, General filed suits in Ohio against Firestone and McCreary for infringement of this same patent.

On April 13, 1961, General moved for a transfer of the Maryland suit to Ohio.

On May 9, 1961, a telephone conversation took place between Mr. Birch, counsel for Firestone, and Mr. McCreary, Sr., regarding the billing of McCreary Tire and Rubber for fees and expenses.

On July 6, 1961, the transfer motion of April 13th was heard, and the district court in an oral opinion rendered the same day denied General's motion to transfer without prejudice to renewal upon changed conditions and enjoined General from prosecuting its Ohio cases against the Maryland plaintiffs.

In October 1961 McCreary, Sr., filed answers to interrogatories of General in which he denied that he had any agreement with Firestone concerning the prosecution of this suit, and in August of 1962 Mr. Clark, house patent counsel for Firestone, deposed to the same effect.

On September 6, 1963, General renewed its motion to transfer the case to Ohio, and on October 14, 1963, the

court denied this second motion. In its opinion the court said:

> "Further the court is completely unconvinced that a transfer would really conserve judicial manpower. Plaintiffs have consistently stated that if a transfer were made, they would oppose consolidation; they have for the most part, refused to agree that discovery proceedings in the Cleveland cases may be used in this case; and it appears that this case, set firmly for trial on January 7, 1964, in this court will be reached, and (hopefully) will be decided before the Cleveland cases, which may be set for trial in April 1964, if the parties are then ready for trial."

On November 5, 1963, General filed a petition for mandamus to compel the transfer, which this court denied. See note 1 *supra*.

On April 15, 1964, the Maryland case began trial on a four day per week schedule.

In October 1965, there was disclosed to General a memorandum in the handwriting of Mr. Irons, counsel for Firestone, concerning the meeting on March 17, 1961, with counsel for Goodyear and U.S. Rubber.

On April 18, 1966, there was disclosed to the court and counsel for both sides a transcript of the telephone conversation between Mr. McCreary and Mr. Birch which took place on May 9, 1961. The transcript was found in Mr. McCreary, Sr.'s desk after his death by Mr. Blenko, who had replaced Mr. Irons as counsel for McCreary Tire and Rubber Company.

On June 28, 1966, General again renewed its motion to transfer or in the alternative to dismiss the suit.

On September 26, 1966, the renewed motion was denied, and General again seeks from us a writ of mandamus.

Preliminary to the question of whether or not we should issue the requested writ is the question of whether or not we have jurisdiction to entertain the petition under 28

U.S.C. § 1651(a).[2] We think *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1956), has clearly settled the question of this court's jurisdiction to entertain a petition under the All Writs Statute and to issue the writ under extraordinary circumstances. In *La Buy* the circuit court had issued the writ compelling the trial court to revoke orders of reference to masters in certain antitrust cases. The respondent insisted that the circuit court had no jurisdiction to entertain the petitions because the references would not prevent the appellate court from ultimately reviewing its action on appeal. The Court rejected this argument, saying that the question of the naked power to entertain the writ had long since been settled by the Supreme Court, and adding: "Since the Court of Appeals could at some stage of the antitrust proceeding entertain appeals in these cases, it has the power in proper circumstances, as here, to issue writs of mandamus reaching them." While this Court has been extremely reluctant to exercise its authority,[3] we have not held that the court lacked jurisdiction to entertain the petition, and in *United States & Wirtz* v. *Hemphill*, — F.2d — (decided November 25, 1966), the writ was issued in a case in which the action of the district court would have ultimately come before this court for review but we felt the issuance of the writ to be the only practical or adequate remedy for an abuse of discretion.[4]

In addition to the usual forum non conveniens arguments which it had offered in support of its motion to transfer

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[2] 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] *Cf.* General Tire & Rubber Co. v. Watkins, 363 F.2d 87 (4 Cir. 1966); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4 Cir. 1964); General Tire & Rubber Co. v. Watkins, 326 F.2d 926 (4 Cir. 1964); Moorehead v. Barksdale, 263 F.2d 117 (4 Cir. 1959); Clayton v. Warlick, 232 F.2d 699 (4 Cir. 1956); Clinton Foods, Inc. v. United States, 188 F.2d 289 (4 Cir. 1951).

[4] See also Schwab v. Coleman, 145 F.2d 672 (4 Cir. 1944) (indefinite continuance by district court).

General also contends bad faith and fraud on the part of the plaintiffs would justify either transfer or dismissal. It first contends that the Maryland suit was brought by Firestone at the behest of counsel for Goodyear and U.S. Rubber in order to divide the resources and energies of General between Ohio and Maryland and not as a bona fide effort to obtain an expeditious determination in a convenient forum of the rights of the nominal plaintiffs. In support of this contention it offers the memoranda which Mr. Irons, counsel for Firestone, and Mr. Fowler, attorney for Goodyear, made at the New York meeting.[5] It also

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[5] "DEFENDANT'S EXHIBIT 1840

"Mr. Iron's Memorandum of March 17, 1961 Meeting Between Counsel For U. S. Rubber, Firestone and Goodyear.

(original in longhand)

Mr. Fowler — Cahill, Gordon, Reindel and Ohl
Mr. Correa — March 17, 1961
Mr. Kenyon — 10:30 A.M.
Mr. Mandelbaum
Mr. Clark
Mr. Irons

Mr. Kenyon—Want to start backfire and keep it burning—Where How. If A sues in its name Firestone sued in Cleveland. If Firestone joins w/Armstrong as Plaintiff.—Transfer more probable.

Mr. Correa: Fair chance would happen

Mr. Kenyon: Problems are
(1) Make Case stick
(2) Judge
(3) Cf. 2 Cir.

Discussion of 2 Cir. panel
Depends on Panel.

Mr. Clark: Desire to file limited to E.S.I. and S.M.C. at least.
2-3-8

Gates (10). California (9).

While considering, keep mum in re clients *per se*.

Mr. Correa/Mr. Fowler: Good case for Transfer

Query—Check transfer law in 3 Cir. Dist. in Wilmington—Pitt District.

Proposed approach to Attorney General to reverse position of Justice Department in respect to whether General Tire patent is within General Tire research contract.

Congress is in Washington.

Mr. Correa favors prompt conference with Justice Department, cf. timing in relation to proposed Firestone Case.

Mr. Correa

Summary—one appeals to Correa is suit on license alone in D.C.

Mr. Kenyon concurs.

"DEFENDANT'S EXHIBIT 1826

"[Memorandum of March 17, 1961 meeting between U.S. Rubber, Goodyear, and Firestone. The original of this document is in the handwriting of Mr. Fowler, attorney for Goodyear.]

General v. Goodyear

Stan Clark, Irons—
Kenyon, Mandelbaum—
Correa, JAF

Friday, March 17th

1. Armstrong — Makes QER & buys it from Firestone—
2. General has given Armstrong notice & offered license—General has sent licenses to 16 or 19 tire companies—So the controversy exists—
3. Armstrong would not sue—Firestone must finance it & be in control—

What's the chance of the suit being transferred to Cleveland—

5. 2d (illegible) & 8th Circuits are possibilities—

Mat's suggestion:

1. Firestone file suit in District of Columbia for declaratory judgment on license—No diversity, no Fed. question.
2. General will have to file compulsory counterclaim for patent infringement—
3. Recent decision of Sup. Court says suit cannot be transferred under § 1404(a) to a District Court where it could not originally have been brought—

The original complaint could not have been filed in Fed. Court in Ohio—

It is filed in Dist. Court in D.C. as the "municipal" Court—

4. Form non conveniens—"

points to the admitted fact that counsel for Goodyear and U. S. Rubber billed their clients for this meeting, although Mr. Clark claims the meeting was called at his behest and for the benefit of Firestone and that counsel for Goodyear and U. S. Rubber were committed not to disclose to their respective clients what was said at the meeting. Secondly, General contends that bad faith was present in the insistence of Firestone and McCreary that McCreary was a wholly independent coequal plaintiff who was free to participate in the action without reference to Firestone's interests. In support of this contention it offers a transcript of a three way telephone conversation[6] which took place

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[6] "DEFENDANT'S EXHIBIT 1836

"[Transcript Made in Mr. Irons' Office of Telephone Conversation with Mr. Harry C. McCreary, Sr.,] 3/30/61

Irons: Mr. McCreary, this is Mr. Irons, Hal Birch's partner, down in Washington. Stanley Clark from Firestone is on the other line.

Clark: How are you this morning?

Irons: We are about to reach a decision about what to do about General and what we would like to do, Mr. McCreary, is file suit in Baltimore using Firestone and McCreary jointly as plaintiffs to attack the General patent and to assert the rights under the government contract with Firestone as nominee. Mr. Beckett talked to you about this. I understand from him that this has been discussed with you and that you have no objection to it. Is that correct?

McCreary: That's correct.

Irons: Mr. McCreary, the thinking in this direction is that as far as the cost of the litigation is concerned with this office that you would be billed for it, but suppose there is a decision which is adverse. I don't know whether Mr. Beckett covered this with you or not but to the extent that you purchased your oil extended rubber from Firestone, of course Firestone would have to pay on that anyway, but you are not looking for Firestone to hold you harmless in that event with respect to rubber you purchased from them.

Clark: I don't think you would go that far. We, of course, are going to fight this thing one way or the other. These people

on March 30, 1961, between McCreary, Sr., then President of McCreary; Mr. Clark, house patent counsel for Firestone; and Mr. Irons, counsel for both plaintiffs in this case until sometime after Mr. McCreary, Sr.'s death, and particularly the transcript of a telephone conversation be-

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are asking 4¢ a tire; they are asking a little more than that on camelback. It amounts up to the total demand on the whole industry of about $6,000,000.00. You can figure out yourself what the 4¢ a tire will mean to your company. It may not mean as much to you as it does to Firestone.

McCreary: I don't know about that. Firestone has lower costs than we have. I try not to worry about that.

Irons: All I am saying is this. General has been going after the tire makers, not the rubber manufacturers and so far the rubber manufacturers have not and probably will not extend any immunity with respect to oil extended rubber with this sale to customers. Each tire company has to go ahead and take his own risk with respect to his patent. You run some risks in going into this suit. If we lose, you lose with us. You understand that?

McCreary: Certainly. Certainly. If you fight without us and you lose, then I lose.

Clark: If we sit back and don't do anything, we have lost just as surely as we sit here.

McCreary: I would be glad to join with you and also do anything here I can.

Clark: Wonderful. If we win, both of us are in free.

McCreary: Well that I appreciate and I will try to show my appreciation by being just as active in this thing as I think you want us to be.

Irons: We won't make many demands on you but there were to be—

McCreary: We'll take care of our own travel bills and stuff like that.

Irons: Hal Birch sends his regards to you Mr. McCreary.

McCreary: Thank you and send mine to him. You will probably want some signatures.

Irons: We may on some affidavits and any papers that will be of interest to you.

McCreary: Keep us posted and we'll be guided by your office 100%."

tween Mr. McCreary, Sr., and Mr. Harold Birch, a partner to Mr. Irons, which took place on May 9, 1961.[7]

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[7] The following is a transcript of the pertinent part of the telephone conversation:

"Voice No. 1: Hello, hello.
Voice No. 2: Hello, hello, sir.
Voice No. 1: Hello.
Voice No. 2: Can you hear me?
Voice No. 1: Yes.
Voice No. 2: Just a moment for Mr. Birch in Washington.
Voice No. 1: Right.
Voice No. 3: Hello.
Voice No. 1: Hello.
Voice No. 3: Hal Birch, Mr. McCreary.
Voice No. 1: Yes.
Voice No. 3: How are you up in Indiana?
Voice No. 1: First class.
Voice No. 3: Why, we've been going around and around and around with General, as you know, and we've got a little bit of a problem. There is a bit of a schism in their approach to McCreary as against Firestone, and we think they're probably trying to line up to say in the long run that McCreary can be transferred out because they are just Firestone's little patsy, and Firestone is paying the whole bill.

Now, here is what we'd like to do, if it's all right with you, with full recognition that the agreement that was made between you and Stanley Clark is not going to, in the long run, change one tiny little bit. I don't want to put anything in the mail, and I don't want to talk about it too much, for obvious reasons.

Voice No. 1: Right.
Voice No. 3: What we would like to do is this: The relative production as between you and Firestone is about 99 to 1.
Voice No. 1: That sounds about right.
Voice No. 3: In other words, you are 1 per cent of their total business, tire business.
Voice No. 1: Right.
Voice No. 3: So what we would like to do would be to formally bill you folks for 1 per cent of the cost of this litigation, which this last month would add up to the tremendous figure of $34.86.
Voice No. 1: I believe we could stand that.
Voice No. 3: If you could stand that—
Voice No. 1: I think s—

In short General contends that the memorandum of Mr. Irons on the March 17, 1961, meeting discloses that Fire-

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Voice No. 3: Well, that's about what it'll be monthly, and then if you could send us that amount of money just as if we were—

Voice No. 1: Right.

Voice No. 3: —Firestone didn't even exist.

Voice No. 1: Right

Voice No. 3: Bearing in mind that—

Voice No. 1: Right

Voice No. 3: —after this is all over with, why, everything will come out in the wash.

Voice No. 1: That's right.

Voice No. 3: Okay?

Voice No. 1: That's perfectly all right.

Voice No. 3: All right. Well, we didn't think you would have any serious—

Voice No. 1: Not at all, and I certainly don't want them to be able to split this thing apart.

Voice No. 3: Well, that is right, because what they have now done, I don't know whether Ed has talked to you about this recently, but what they have now done is move in Ohio to enjoin Firestone from proceeding in the Maryland lawsuit. Well, of course, we have already moved in Maryland to enjoin them from proceeding against Firestone in any other court.

Voice No. 1: Uh hum.

Voice No. 3: So this is—ah—in two courts now, and real interesting, but they did not move to enjoin McCreary.

Voice No. 1: Uh huh.

Voice No. 3: See?

Voice No. 1: Uh huh.

Voice No. 3: So we don't want to leave any stone unturned in case they should file an interrogatory and ask McCreary if they are paying their toll in this lawsuit.

Voice No. 1: I certainly—

Voice No. 3: Whatsoever.

Voice No. 1: I certainly want to be able to prove it.

Voice No. 3: Right. So what we want to do is to send you—and we'll send you a bill for both March and April.

Voice No. 1: Fair enough.

Voice No. 3: The March bill will be even smaller than the $34.00.

Voice No. 1: Well, that's quite all right.

Voice No. 3: (Laughter) Okay."

stone was asked to start a "backfire" by U.S. Rubber for the purpose of delaying and disrupting the Ohio litigation; that this case was brought 13 days after such request; that the parties recognized the possibility of a transfer to Ohio, and to prevent it McCreary was brought in as a co-plaintiff and represented to be an independent party while in fact there was a secret agreement that Firestone through joint counsel would completely dominate and control this case.

In a long and meticulous memorandum opinion filed by the court on October 17, 1966, the court reviewed the evidence concerning General's charges and found with Firestone on all points. It found that the New York conference was held at the request of Firestone's counsel; that Firestone did not start the Maryland suit as a "backfire"; that McCreary was not decided on as a party plaintiff until the day the complaint was filed, and that it was completely independent and chose the forum for its own convenience and because of its commercial activity in Baltimore. It further found that McCreary's agreement to pay one per cent of the expenses and attorneys' fees was a bona fide agreement and the only agreement between the plaintiffs with respect to the lawsuit, and that there was no agreement that Firestone would ultimately repay McCreary. The court thereupon denied the motion to transfer on the grounds that there was no attempt to practice fraud on the court and that in any event the court was not deceived about McCreary's relationship to its co-plaintiff.

We do not feel it advisable at this stage in the lawsuit to pass on the district court's findings and conclusions with respect to General's contentions of bad faith and misrepresentation to the court. Without denigrating the importance of these issues in the ultimate assessment of costs between the parties, we think that their resolution in favor of Firestone should not have been determinative of the motion to transfer. Indeed we think the court's preoccupation therewith caused it to overlook completely the factor which should have controlled the decision. That factor was the

complete change of conditions which had taken place since the motion was originally denied. This failure resulted in an order which constituted an abuse of discretion.[8]

That conditions had changed is evident upon examination of the reasons set forth in the judge's memorandum opinion filed on October 14, 1963 denying both the original motion and its renewal, *i.e.*, that the Maryland case would be reached and tried before the Ohio case could be started. Furthermore, although the court concluded on October 14, 1963, and again on September 24, 1966, that its original denial of the transfer motion was not influenced by McCreary's presence as a party plaintiff, we think the subsequent settlement with McCreary on July 18, 1966, further strengthens the case for transfer at this time.

We turn now to our reasons for issuing the writ under the extraordinary circumstances of this case. We think the district court erred in its failure to weigh the impelling need for efficiency in the administration of our court system against the right of Firestone to continue the trial in a forum which no longer offered to it any convenience over the Ohio forum. Certainly the simultaneous trial of two suits in different circuits involving a number of identical questions of fact and law would result in a useless waste of judicial time and energy. Against the judicial time and effort already spent on the Maryland case must be weighed the fact that the Ohio judge either has been, or will have to be, "educated" in much of the same factual background whether or not the Ohio case against Firestone can be consolidated with its companion case against U. S. Rubber.

The United States Supreme Court considered the question of multiple litigation in the federal courts in *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180 (1952). In that case

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[8] For an interesting discussion of the criteria which should determine the exercise of discretion to issue the extraordinary writ see: *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise With Finality*, 52 Calif. L. R. 1036.

C-O-Two, owner of two patents, brought an infringement action in Illinois against a customer of Kerotest, manufacturer of the allegedly infringing item. Kerotest subsequently brought a declaratory judgment action on the same patents in Delaware. Later Kerotest was joined as a party defendant in the Illinois action. The Delaware district court stayed the Illinois suit as against Kerotest on the ground that the Delaware action had commenced before Kerotest became a party to the Illinois suit. The Third Circuit reversed, ordering the district court to stay its proceedings in the case until 10 days after final determination of the Illinois litigation. The Third Circuit refused to rest its decision upon so artificial a test as the chronology of the suits, but rather considered the test to be "whether the relief sought can be 'more expeditiously and effectively afforded [in the other suit] than in the declaratory proceeding'." The Supreme Court, in affirming the Third Circuit said:

> "The Federal Declaratory Judgment Act facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." 342 U.S. at 184.

The Court also noted that "the manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity." *Id.* at 185.

The Second Circuit, in *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F.2d 145 (2 Cir. 1949), stressed the expediency of avoiding multiple trials involving common issues.

In that case, the issue was who owned rights to the character "Sam Spade," with Warner Bros. claiming rights under its copyright on *The Maltese Falcon,* and Hammett, the original creator of the character, claiming Warner's copyright covered only that book and not the character as it may appear in other books and stories. Warner Bros. commenced a suit in California, while Hammett brought a declaratory judgment action in New York. The Second Circuit affirmed the district court's dismissal of the New York action on grounds that all issues would be resolved in California. See also *Alamance Industries, Inc.* v. *Filene's,* 291 F.2d 142 (1 Cir. 1961).

Our situation is factually different from both *Kerotest* and *Hammett* because the suit which is set to be tried in Ohio in March is against U. S. Rubber and not Firestone. Presumably General's Ohio suit against Firestone was not consolidated with the suits against Goodyear and U. S. Rubber because the Maryland district court had enjoined General from prosecuting its Ohio suit. This difference necessitates our invoking a different remedy, but the principle to be applied is the same: maintenance of judicial economy. The prompt transfer of the Maryland suit to Ohio will make it available there for consolidation and trial in March with the suit against U. S. Rubber. In view of the complex and time consuming nature of patent cases, the advisability of consolidation is obvious. See *Pharma-Craft Corp.* v. *F. W. Woolworth Co.,* 144 F.Supp. 298 (M.D. Ga. 1956). The district court, in its denial of General's second transfer motion, pointed out that Firestone had expressed a determination to fight consolidation if the case were transferred. While we suspect that Firestone might have a change of heart after transfer, in any event, its opposition would not be determinative of the issue. See *American Photocopy Equip. Co.* v. *The Fair,* 35 F.R.D. 236 (N.D. Ill. 1963). This record discloses no reason why consolidation should not be as feasible here as in the two other cases.

Since General's Ohio case against U. S. Rubber cannot be moved to Maryland and consolidated for trial with the pending declaratory judgment suit, we think the district court abused its discretion in not transferring the Maryland case to Ohio where it will be available for consolidation—the only way in which time and effort can now be saved. The traditional forum non conveniens argument is no longer available. Both parties are Ohio corporations with their main offices in that state. It is the center of rubber manufacture in the United States, and many if not most of the documents and witnesses are there. Firestone has made no serious argument to the contrary. The evidence indicates a high degree of forum shopping which we recognize as an inevitable adjunct to the congressional policy on declaratory judgment suits in patent litigation, but forum shopping must not be indulged in the face of multiple litigation especially where, as here, the shopper is offered an equally convenient forum. See *Caldwell Mfg. Co.* v. *Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

We are aware of the distinction made by some courts of appeal between entertaining a writ of mandamus from an order of a district court denying transfer under 28 U.S.C. § 1404(a) and entertaining a writ when the district court granted transfer. *E. g., In re Josephson*, 218 F.2d 174 (1 Cir. 1954). See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 260 (1957) (Justice Brennan dissenting). The reasoning is that extraordinary writs authorized under 28 U.S.C. § 1651 are to be issued only in aid of appellate jurisdiction, and, since denying transfer does not deprive the appellate court of ultimate jurisdiction to hear the issue on appeal, issuance of the writ in such a situation is not properly in aid of the court's jurisdiction. On the other hand if the district court transfers the case out of the circuit, the court of appeals is being deprived of its ultimate jurisdiction to review and, therefore, mandamus is deemed justifiable.

While the rationale of *In re Josephson* has merit where the issue before the court is whether the district court has abused its discretion in circumvention of the rights of the parties, we find it inappropriate in our situation. We are not concerned here only with the rights of private litigants which we feel in any event will not be impaired in the least by transfer.[9] Nor are we concerned only with the problem of whether or not we shall ultimately lose our jurisdiction to review to another appellate court. Rather, our interest is with effective administration and supervision of the courts of our circuit. It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done. We do not believe that the rule developed in those cases was intended to prevent our acting in this extraordinary situation.

We are not here permitting use of mandamus as a substitute for interlocutory appeal, which is, with a few statutory exceptions, prohibited in the federal courts. See 28 U.S.C. §§ 1291-92. Rather, we are using the writ for a purpose for which we think it was intended—to correct a wrong to the court which otherwise can never be effectively presented on appeal. The order of the district court is reversed; the writ will be issued.

An appropriate order will be entered.

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[9] We agree with the statement of Judge Learned Hand in Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866, 869 (2 Cir. 1950): "We do not believe that our power to protect our own jurisdiction extends to protecting it as against the jurisdiction of another federal court of equal jurisdiction, or that a suitor has any legally protected interest in having his action tried in any particular federal court, except insofar as the transfer may handicap his presentation of the case, or add to the costs of trial."

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,993

THE GENERAL TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland, *Respondent.*

THE FIRESTONE TIRE & RUBBER COMPANY, *Intervenor.*

On Petition for a Writ of Mandamus

THIS CAUSE came on to be heard upon the petition of The General Tire & Rubber Company for a writ of mandamus and the motion of The Firestone Tire & Rubber Company, Intervenor, to dismiss petition for writ of mandamus, and was argued by counsel.

ON CONSIDERATION WHEREOF, and the Court being unanimously of the opinion that the case should be transferred to the United States District Court for the Northern District of Ohio, Eastern Division, it is now here ordered that the petition for a writ of mandamus be, and it is hereby granted, and that the Honorable R. Dorsey Watkins, District Judge of the United States District Court for the District of Maryland, is ordered and directed to vacate his order of September 26, 1966, denying the renewed motion of The General Tire & Rubber Company to transfer Civil Action No. 12,932 or in the alternative to dismiss the suit, and to enter an order directing the transfer of

the said civil action to the said District Court for the Northern District of Ohio.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

SIMON E. SOBELOFF
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

J. S. BELL
United States Circuit Judge.

HARRISON L. WINTER
United States Circuit Judge.

J. BRAXTON CRAVEN, JR.
United States Circuit Judge.

Filed Jan. 12, 1967

MAURICE S. DEAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,993

THE GENERAL TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland, *Respondent.*

THE FIRESTONE TIRE & RUBBER COMPANY, *Intervenor.*

Order

Upon consideration of the motion of the Intervenor, the Firestone Tire and Rubber Company, for a stay of execution of the Writ of Mandamus filed on January 12, 1967, and the objection of petitioner to the granting of a stay of more than fifteen additional days, and

Upon further consideration of the desirability of avoiding any additional delay in the commencement of the trials of the several proceedings in Ohio beyond that reasonably necessary to enable the Intervenor to petition the Supreme Court of the United States for a review of our judgment and for such additional stays as may be appropriate in connection with proceedings in the Supreme Court, and

After consultation with my Brothers.

IT IS ORDERED: That execution of the Writ of Mandamus filed on January 12, 1967 be stayed for a period of forty days from January 12, 1967, provided that within thirty days from January 12, 1967 the Firestone Tire and Rubber Company shall apply to the Supreme Court of the United States for a writ of certiorari to this Court.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Filed Jan. 20, 1967

MAURICE S. DEAN
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 12932

THE FIRESTONE TIRE & RUBBER COMPANY

v.

THE GENERAL TIRE & RUBBER COMPANY

Memorandum on Defendant's Renewed Motions to Transfer and to Impose Sanctions

The defendant, The General Tire & Rubber Company (General), has renewed its motion of April 13, 1961 to dismiss or transfer, and its motion of September 6, 1963, to transfer, this case to the United States District Court for the Northern District of Ohio, Eastern Division. Defendant further moves that sanctions be imposed upon plaintiffs,[1] including General's attorney fees and expenses arising from the prosecution of Civil Action No. 12,932, and an equal amount "against plaintiffs payable to the Court to compensate for plaintiffs' gross imposition upon the Court and hardship caused other litigants by plaintiffs' fraudulent monopolizing of over two and one-quarter years of the Court's time . . . [and] for such other penalties, sanctions, and relief as the Court may see fit."

The Court is also requested to enter certain proposed Findings of Fact.

The motions are stated to be based, "in addition to the grounds set forth in the documents supporting the previous transfer motions, upon newly discovered evidence which was kept from defendant by plaintiffs, although it was in the possession and control of one or both plaintiffs

[1] Plaintiff McCreary and defendant General have reached a settlement and the Amended Complaint of McCreary has been dismissed with prejudice.

and known by them prior to the transfer motions of April 13, 1961 and September 6, 1963. The motions are also brought following the suggestions of the Court of Appeals in Case No. 10,429, at pages seven and eight of its opinion. [General Tire & Rubber Company v. Watkins, 4 Cir. 1966, 363 F. 2d 87, 89-90]."

Significantly, there is no renewal of, or even mention of, defendant's motion of October 12, 1965, seeking, among other things, a dismissal of the declaratory judgment action of McCreary Tire & Rubber Company (McCreary), a dismissal of the declaratory judgment action of The Firestone Tire & Rubber Company (Firestone), or in the alternative, a dismissal of the non-infringement portions of the declaratory judgment action; and to charge Firestone and McCreary "with costs, expenses and attorney fees resulting from their improper declaratory judgment action and conduct", and such additional relief as the Court may consider proper.

No mention is made of the Supplemental Statement filed by defendant on October 26, 1965, in support of the motion filed October 12, 1965. This Supplement is primarily related to meetings in March 1961, purportedly involving the relationship of Goodyear Tire and Rubber Company and United States Tire and Rubber Company to this litigation.

Finally, no mention is made of this Court's ruling on December 13, 1965, denying the motion of October 12, 1965 as supplemented on October 26, 1965, raising substantially the same contentions as are made herein, nor of the Court's oral opinion thereon (Transcript, pages 26,987-27,010).

In General Tire and Rubber Company v. Watkins, supra, the Court of Appeals said (363 F. 2d at pages 89-90):

> "Since the oral argument McCreary and General Tire have filed certain papers in this court in an effort to amplify the record. They are bottomed upon

what purports to be a tape recording of a telephone conversation between a former president of McCreary and one of the lawyers for Firestone. It is suggested that there was falsity in the plaintiffs' representations—in opposition to General's original motion to transfer the case to Ohio—that McCreary was an independent party prosecuting the case at its own expense. These representations may well have been the determinative factor in the denial of the transfer motion. If they were in fact untrue, it appears that the plaintiffs may have practiced a serious fraud upon the District Court.

"However, these papers are not germane to the present petition for mandamus to disqualify the District Judge, and the propriety of the earlier motion to transfer is not now before us. If the tape recording constitutes newly discovered evidence warranting reconsideration of the motion to transfer or any other relief, or the imposition of any sanction, it should first be presented to the District Court, with a motion stating what relief is claimed. After a hearing, the District Court will be in position to determine the authenticity of the tape recording, the truth and materiality of any representations made to the court earlier, and to grant whatever relief may be appropriate.

"After the District Court has acted upon an amplified record, this court can entertain any issue appropriately brought up for review. Until then, any application based upon the tape recording or a claim of earlier misrepresentation should be addressed to the District Court."

Neither side has asked to take further testimony, or otherwise to amplify the record. However, oral argument was had on September 19, 1966, and on September 26, 1966, the Court advised counsel that the motion had been denied—this memorandum states the reasons therefor.

In its Memorandum in support of the present Motions defendant says (pages 1-2):

> "Pursuant to this clear invitation of the Court of Appeals, defendant has renewed its April 13, 1961 motion to dismiss or transfer and its September 6, 1963 renewed motion to transfer. The foundation for the present renewed motion is the *newly discovered evidence* comprising DX 1840, the 'backfire' memorandum, and the dictaphone recording of the May 9, 1961 telephone conversation between Mr. Birch and Mr. Harry C. McCreary, Sr. (R. 33,325-33,330." (Emphasis supplied).

DX 1840 was filed September 30, 1965, well before this Court's opinion of December 13, 1965, denying defendant's motion to dismiss as supplemented (which raised issues presently before the Court) so that the only "newly discovered evidence" is the dictaphone recording, certain papers in McCreary's files (McCreary Exhibits 1-7), and the testimony with respect thereto. This Court might well confine its consideration to the significance, if any, of this newly discovered evidence on the claim of fraud. Since, however, the charge is so serious, and defendant attacks the professional integrity of Firestone's attorneys, including the credibility of Firestone's house counsel, who is also an attorney, although not engaged in court appearances, the Court will consider all of the grounds advanced by defendant in defendant's Memorandum and proposed Findings of Fact.

1. *The Origin of this Litigation.*

Defendant contends that Firestone brought this action at the invitation of Goodyear and U. S. Rubber to delay and disrupt the Ohio litigation. Reference is made to a claimed "backfire" suggestion of Mr. Kenyon; the significance of DX 1840; and the claim is made that the dictaphone recording showed that some secret agreement existed between Firestone and McCreary. The same con-

tentions, including the one that there was an undisclosed agreement between Firestone and McCreary (but not, of course, relying upon the dictaphone belt), were made by defendant in its Memorandum in support of its October 12, 1965 motions; together with an attack upon the "chameleon testimony" of Clark, Firestone's house patent counsel.[2]

These contentions, except as to the significance of the dictaphone belt, were in effect found to be lacking in merit by this Court's ruling and oral opinion of December 13, 1963 (Transcript, pages 26,987-27,010, and especially 26,-991, where there is a reference to the "backfire"; and 26,-991-26,993 where the New York conferences are mentioned).

However, that there may be no doubt, the Court, after a consideration of the record, and particularly the testimony of Mr. Clark, both by way of deposition and in open court; DX 1840; and the exhibits to defendant's Supplemental Statement, filed October 26, 1965, finds that the substance of the New York conference on March 17, 1961 is as stated by Clark in Transcript, pages 22,230-22,244; that the conference was initiated by Clark to consider trial tactics by Firestone, including the place where a declaratory judgment suit should be filed and the possible effects of an earlier decision in either the Cleveland, Ohio litigation or where Firestone might sue; that the instant litigation was not at the suggestion or request of United States Tire and Rubber Company and/or Goodyear Tire and Rubber Company, but was a bona fide and independent effort on the part of Firestone to secure an adjudication in a circuit other than the Sixth Circuit; that the joinder of McCreary was a last minute idea, stimulated by the inclusion in the draft complaint of a reference to an alleged world-wide license; and that no fraud was attempted or perpetrated upon the Court as to the origin of the litigation.

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[2] This attack is repeated in defendant's Response to Plaintiff's Proposed Findings in opposition to defendant's Motions to dismiss or transfer, to transfer and for the imposition of sanctions.

This finding is made because the Court is satisfied that the witness Clark testified honestly in his deposition and in court. The Court has also taken into consideration his general demeanor on the stand and that the discrepancies, if any, were insubstantial; and that his inabilities to recall were because of, and consistent with, the passage of time and the absence of memoranda kept by him.[3] These conclusions are fortified, as to the March 17, 1961 meeting, by the Answers to Interrogatories, filed by defendant on October 26, 1965, with respect to Messrs. Kenyon and Mandelbaum, attorneys for United States Rubber Company, and Mr. J. A. Fowler, Jr., attorney for Goodyear Tire and Rubber Company. Messrs. Kenyon and Mandelbaum are reported as stating, with regard to Transcript, pages 22,-230-22,244, that "So far as concerns their recollection of the events that occurred at the meeting of March 17, 1961, their recollection is in general[4] in accord with the aforesaid testimony." As to Mr. Fowler, reference is made to Mr. Clark's testimony on September 30, 1965, and it is stated: "Mr. Clark in his answers stated his recollection or speculation, and Mr. Fowler is not in a position to disagree with such answers."

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[3] In reaching these conclusions the Court has considered McCreary exhibits one through seven submitted by Mr. Walter J. Blenko, Jr. at the time of the hearing of April 26, 1966 in this court and has found the discrepancies, if any, between Clark's testimony and Mr. McCreary Sr.'s memoranda relating to their communications prior to the filing of the instant suit insubstantial and of no materiality on the issues involved in the current motions.

[4] Defendant apparently argues that because Messrs. Kenyon and Mandelbaum agreed "in general" they should have stated any particulars in which they did not agree. The Court construes the statement attributed to them to mean that while they might have used language different from Clark's, in substance they agreed with him. Clearly their language does not permit of a construction that they disagreed on any material aspect or statement.

2. *The "Agreement" between Firestone and McCreary.*

The question of agreement between Firestone and McCreary as to McCreary's responsibility seems to have been considered under four topics or aspects—(a) indemnity or hold harmless; (b) dependence or independence; (c) liability for expenses; and (d) "secret." These will be considered in the same order.

(a) Indemnification or hold harmless.

All the testimony, and the answers to an appropriate interrogatory are to the effect that there never was any agreement by Firestone to hold McCreary harmless, or to idemnify it, with respect to this litigation. Except as it may be implicit in the claimed "secret" agreement[5], there is no serious contention that any such indemnification or hold harmless agreement existed.

The Court finds as a fact that there was no such agreement.

(b) Dependence or independence of McCreary.

The testimony and exhibits have consistently shown that McCreary had some sort of responsibility with respect to the cost, including attorneys' fees, of this litigation. In that respect only, may McCreary be said not to have been completely independent of Firestone, in that Firestone was to bear the bulk of the expenses.

Other than financial, the record on relationship is as follows:

(i). On July 6, 1961, at the hearing on the first transfer motion, Mr. Irons spoke of Mr. McCreary (in the latter's presence) as follows:

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[5] Since the terms of a "secret" agreement are necessarily not known except to the alleged parties, arguably the agreement could be all-embracive, or limited to a single point. Defendant has not sought to enlighten the court as to what the terms of the supposed secret agreement are.

"He [McCreary] comes here jointly as plaintiff with Firestone, but other than that, independent, he pays my bills as I send them to him, . . . he can accept a judgment against him or he can take such other action as he wants to, he is subject to no mandate or direction from Firestone." (Page 62).

• • • • •

"He [McCreary] can, perhaps, derive some benefit from his association with Firestone, but he comes here independently, and not as Firestone's agent or cat's paw, and I think that should be clearly understood." (Page 63).

(ii). In his affidavit filed June 30, 1961, in opposition to the transfer motion, Mr. Irons referred several times to McCreary's independence.

(iii). In plaintiffs' Reply Memorandum filed before the pretrial hearing of July 6, 1961, it is stated (pages 17-18):

"Nor are there any aspects of 'McCreary's customer-supplier relationship with Firestone' which require proofs located in Akron. McCreary simply purchases unpatented oil-extended rubber from Firestone in routine manner. Such purchases are completed in Indiana, Pennsylvania. Other than conventional purchase orders, there are no oral or written contracts whatever between Firestone and McCreary.[19]"

"[19] Hence the testimony of 'persons having knowledge of Firestone's relationships with its customer McCreary' (Def. Br. page 17) is not material."

Defendant quotes only the last sentence of the text, without reference to the footnote, or to its omission, and argues that this is inconsistent with an agreement to pay part of the expenses of litigation.

The Court finds that in context, the reference was as to the absence of any reason to transfer to Ohio, for the

convenience of securing evidence as to the work-a-day customer relationship between Firestone and McCreary. The Court would not and does not construe the whole, or the quoted part, of the paragraph, as a representation to the Court that there was no arrangement as to the sharing of the litigation expenses.

(iv). Defendant refers to McCreary's answers to Interrogatories 11 and 12, filed on October 16, 1961, and read into the record on April 28, 1965, at Transcript, pages 18,372-18,374. Interrogatory 11 asked for identity of all written argreements between Firestone and McCreary which relate to participation in this case, to which the answer was that there are none. Interrogatory 12 asked if there were any oral agreements on the same subject matter. The answer was not a simple "No", but:

> "There are no oral agreements between the Firestone Tire and Rubber Company and plaintiff McCreary which relate to the participation of plaintiff McCreary and the Firestone Tire and Rubber Company *in the conduct of* this civil action." (Emphasis supplied).

The contrast in the direct denial in response to Interrogatory 11, and the qualified answer to Interrogatory 12 is significant. "Participation in this case" might well mean participation in any manner, including sharing or contribution in expenses or costs. "Participation . . . in the conduct of" the case would normally mean participation in control of the course of the litigation, including trial tactics, selection of experts, raising of issues, selection of defenses, decisions as to admissions, and decisions as to whether or not settlement should be discussed, and if a settlement were to be effected, when and for how much. An agreement to pay a part of the cost of litigation would be consistent with the absence of any agreement as to participation in or right to participate in the conduct of the case.

(v). The deposition of Clark (Transcript, pages 18,933-18,934) and the testimony of Birch (Transcript, pages 22,668-22,669) as to charges to McCreary are completely consistent with the only arrangement between Firestone and McCreary being the sharing of costs, as is the dictaphone recording, to be discussed in more detail.

(vi). What has actually occurred in this case is a pragmatic demonstration of McCreary's "independence", other than its obligation to pay a share of the expenses. McCreary did, without so far as the record shows any prior consultation with or approval by Firestone, employ new attorneys and discharge its old, enter into negotiations for settlement with General, and finally effect a settlement which left the entire controversy open between Firestone and General. General counters by saying that acts in 1966 do not prove independence in 1961. "The fact that the United States declared independence from Great Britain in 1776 does not mean that it was independent in 1771."[6] But there is nothing in the record to show that McCreary ever indicated that it was dependent upon Firestone, or had to, or did, declare its "independence."

McCreary's conduct in 1966, while it does not prove, is at the very least entirely consistent with, independence of Firestone in the conduct of this litigation, in and since 1961—and the Court finds this to be the fact, except as to McCreary's obligation to pay a share of the litigation expenses.

(c) McCreary's undertaking to pay a share of the litigation expenses.

It has, at least since July 6, 1961, been clear to this Court that some agreement or arrangement existed between Firestone and McCreary pursuant to which McCreary was to bear some portion of the litigation expenses, having

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[6] Defendant's Supplemental Section A, filed September 13, 1966.

relationship to the volume of production of the two companies. The order in which this developed (which is not the chronological order of the events themselves) is as follows:

(i) The statement by Mr. Irons at the July 6, 1961 hearing on the first transfer motion, quoted above, that McCreary "pays my bills as I send them to him . . ."

(ii) In his deposition taken on August 15, 1962 and read in part into the record on May 5, 1965, at pages 18,933-18,934, Mr. Clark testified:

> "Mr. Merriam: Would you turn to page 226, please, line 18:
>
> " 'Q. Does Firestone have any arrangement with McCreary as to payment of the cost of deposition transcripts, documentary production or any other expert witnesses, or any of these items which are incurred in connection with the instant litigation?
>
> " '[A.] You are asking me the same question in different words. There is no—I have told you three or four times now that there is no arrangement between Firestone and McCreary.
>
> " '[Q.] As to payment—
>
> " '[A.] As to any payment.'
>
> "Mr. Merriam: Now, will you go ahead with the continued answer?
>
> " 'A. Let me put it on the record. It has been a general understanding that the bulk of the expenses [18,934] of this litigation are to be paid by Firestone in view of Firestone's greater stake in the matter. The division of the costs were not a subject of agreement with McCreary beyond that general understanding, and the actual billings to McCreary have been left to Mr. Irons and Mr. McCreary and, as I stated yester-

day, I deduce from the size of the bills that we are carrying the greater burden of this litigation, which I think is as it should be in view of the proportionate sizes of the two plaintiffs.' "[7]

(iii) On September 3, 1965, Mr. Clark testified as to a conversation with McCreary the day this suit was filed, in which McCreary was told that Firestone would bear the "bulk of the expenses." At that time the Court stated its recollection of the portion of the Clark deposition read into the record, to the effect that Firestone was bearing the larger portion of the expenses, but that Mr. Clark had made no agreement as to specific amounts or proportions. (Transcript, pages 22,266-22,270).

(iv) On September 28, 1965, Mr. Birch was examined in open court by counsel for defendant. He testified that he had not read the McCreary deposition or Clark's testimony from the stand, and that some years ago he glanced briefly at the Clark deposition for a matter of a few minutes. He

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[7] In McCreary's Reply to "Intervener Firestone's Opposition to Petition of McCreary for Leave to File Additional Material", filed in the Clerk's Office of the United States Court of Appeals for the Fourth Circuit on or about May 13, 1966, Mr. Walker J. Blenko, Jr., as attorney for McCreary, after referring to the dictaphone belt and the discussion of the fees to be charged McCreary by Mr. Irons' firm, says:

> ". . . In all prior testimony known to McCreary and its present counsel, Mr. Clark denied the existence of any agreement between Firestone and McCreary relating to participation in the action or 'as to any payment' (Trial Transcript, page 18,933)."

No reference is made to the last paragraph quoted above, or to the fact that it was a "*continued* answer." This "continued answer" clearly discloses that there *was* an understanding with McCreary as to payment of the litigation expenses.

This partial quotation, without reference to the balance of Mr. Clark's answer, is shocking to this Court. Whether it was fraud or attempted fraud upon, or contempt of, the Court of Appeals, is of course not for this Court to decide.

was asked specifically as to a fee bill of April 30, 1961 of the Irons firm to McCreary, he stated:

> "First, let me start by saying that I do have knowledge with respect to the manner in which the McCreary bill is computed, and it is that a charge is made to McCreary relative to the charge which is made to Firestone, that relation being pro rata, based upon their volume of production." (Transcript, pages 22,668-22,669); see also Transcript, page 22,674).[8]

(v) On September 29, 1965, there was produced by Mr. Irons and admitted into evidence as DX 1836 a transcription of secretarial notes of a telephone conference with McCreary on March 30, 1961. The following is attributed to Mr. Irons:

> "Mr. McCreary, the thinking in this direction is that as far as the cost of the litigation is concerned with this office that you would be billed for it, but suppose there is a decision which is adverse. I don't know whether Mr. Beckett covered this with you or not but to the extent that you purchased your oil extended rubber from Firestone, of course Firestone would have to pay on that anyway, but you are not looking for Firestone to hold you harmless in that event with respect to rubber you purchased from them."[9]

(vi) In its oral opinion of December 13, 1965, on the October 12, 1965 superseding motion, the Court had had before it all of the foregoing, and referred to the "at least

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[8] Birch was clearly in error as to dates and place of discussion with McCreary; see Transcript 22,673-22,674; 33,348-33,349.

[9] Defendant suggests that the memorandum should read that "as far as the cost of the litigation is concerned with this office that you would not be billed for it." As indicated above and below, the memorandum would appear to be, and the Court finds it to be, accurate as written.

partial sharing of costs by McCreary . . . ." (Transcript, page 26,994).

(vii) On April 26, 1966, before the Court had read the transcript of the dictaphone recording of May 9, 1961, or had heard the belt played, it stated:

> "Well, Mr. Birch specifically testified as to the existence of an agreement, and that the agreement was that a charge is made to McCreary relative to the charge which is made to Firestone, that relation being pro rata, based upon their volume of production.
>
> "That is clearly and flatly in the record, pages 22,668 to 22,669.
>
> "I do not believe there has ever been any contention that there was not an agreement between Firestone and McCreary. There may be differences of opinion as to what the true arrangements are, but the testimony of Mr. Birch is flatly to the existence of an agreement, and as to the general nature of its terms."

(viii) On April 26, 1966, the dictaphone record of May 9, 1961 was played and transcribed (Transcript, pages 33,325-33,330). In it, Birch [10] states that General is "probably trying to line up to say in the long run that McCreary can be transferred out because they are just Firestone's little patsy, and Firestone is paying the whole bill." Then the suggestion is made that "with full recognition that the agreement that was made between you and Stanley Clark is not going to, in the long run, change one little bit", that as the relative production between McCreary and Firestone was about 99 to 1, McCreary being one per cent of Firestone's total tire business, "we" would like "to formally bill you folks for one per cent of the cost of this litigation . . ." which would be done monthly, and to be paid to the Irons firm just as if "Firestone didn't

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[10] That "Voice Number 3" was that of Mr. Birch is conceded.

even exist," bearing in mind that "after this is all over with, why, everything will come out in the wash." Birch said he did not want "to leave any stone unturned in case" General "should file an interrogatory and ask McCreary if they are paying their toll in this law suit"; so a bill would be sent for both March and April.

Birch further said that he didn't want "to put anything in the mail, and I don't want to talk about it too much, for obvious reasons."

At the conclusion of the playing of the dictaphone belt, the Court indicated (Transcript, pages 33,332-33,333) that the only matters justifying further interrogation were as to whether Birch intended to refer to a dollar amount per month, or one per cent a month; and what was meant by the agreement with Clark. However, no restrictions were placed on the interrogation of Birch or Clark.

On oral examination Birch testified that he called McCreary at Irons' request and told him "[T]hose things you just heard on the tape"; that he was not aware of an agreement between Clark and McCreary "relating to the case" but he "was aware of an agreement between Mr. Clark and Mr. McCreary that had to do with the payment of fees charged by our firm in a particular circumstance" (Transcript, page 33,338); that the only agreement he knew of was that Firestone would pay for the trip he took to Indiana, Pennsylvania, "[E]xcept for the one on the tape"; (Transcript, page 33,339); that he didn't want to put anything in the mail or talk too much since his firm's fees and their arrangement were their business only; that if Firestone won the case, he had no understanding that fees paid by McCreary would be returned to it (Transcript, page 33,340); that "win, lose or draw, McCreary was to pay, once and for all, one per cent, and that it was regardless of the outcome"; [11] that he could not recall what was meant

[11] The language was embodied in a question by the Court, answered in the affirmative.

about coming out in the wash, but thought it meant "that whether it is paid as a percentage or in a lump sum or now or next week or next year, the result will be the same"; that "formally" meant a written bill; and that while generally aware of his firm's representation of McCreary, Birch had not been intimately connected with it. (Transcript, pages 33,365-33,366).

That same afternoon Clark (who was out of the court room during Birch's examination) was called and testified that other than that he would have thought that he rather than Irons had told McCreary that McCreary would not be held harmless, he saw nothing that struck him as incorrect in DX 1836; as to the reference to the agreement between Clark and McCreary, mentioned on the tape, he said:

> "I think that probably the agreement I had was not to have an agreement. What I thought our understanding with McCreary was was this, that we were both free agents, that Firestone was going to finance this litigation, I had the impression that McCreary would carry its share of the burden, small though that may be; that there was no obligation upon McCreary for example not to settle, McCreary always had the freedom to settle any time they pleased, for example; I also thought and still think that there was no obligation on our part to save McCreary harmless.
>
> "I think it summed up to this point, that McCreary was going to pay its share, but a very small share of the litigation, that we would of course necessarily by our size and by our determination to go ahead essentially finance it. Beyond that, there was nothing." (Transcript, page 33,399).

that he assumed that the reason for Birch's call on May 9, 1961 was to tell McCreary what the ratio of payments was going to be; that there was no other agreement as to

what would happen after the case was over, although he thought that "we would be reimbursed by an order of this Court for costs and attorneys' fees" [12] (Transcript, page 33,400); that there was no agreement with McCreary prior to May 9, 1961 that Firestone would pay all the legal bills; when again interrogated [13] as to the agreement, he said:

> "The only contact I had with Mr. McCreary after we had decided to sue is embodied in this memorandum. It was that telephone call which Mr. Irons and I made to Mr. McCreary on the morning prior—on the morning I guess of the day we filed the suit, and I don't recall ever having a conversation with Mr. McCreary again, certainly not on this subject at all.
>
> "My understanding of the arrangement, if you want to call it that, whatever name you want to put to it is that McCreary was a free agent, free to settle, we did not hold McCreary harmless, McCreary came in at their own risk, and that we were certainly going to pay practically all of the expenses but that McCreary was going to carry a pro-rata burden. That's been my understanding of the arrangement from the very beginning." (Transcript, page 33,409).

The court then inquired of counsel what they desired the Court to do, stating that "if it is a ruling as to whether the tape is inconsistent with Mr. Birch's testimony, I would say that my present rather strong impression is that there is no substantial inconsistency between his testimony in court and the tape." (Transcript, page 33,417).

It has been asserted by counsel for Firestone, without contradiction,[14] that during the litigation McCreary has

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[12] The "wash out" testimony of Birch.

[13] By Mr. Blenko, Jr.

[14] Mr. Blenko, Jr., as counsel for McCreary; certainly had access to McCreary's accounting records, and could easily have refuted the claim if untrue.

regularly been billed for, and paid, a portion of the legal expenses.

The Court finds as a fact that from March 30, 1961 McCreary was aware that it would be billed for part of the litigation costs; that in fact it has been billed for one per cent thereof; that this was a bona fide arrangement, with no agreement that in fact, ultimately, Firestone would bear all the costs or repay to McCreary any payment made by McCreary; and that this arrangement, understood by this Court on December 13, 1965, is consistent with the dictaphone recording of the telephone conversation on May 9, 1961, offered in court on April 26, 1966.

(d) The "secret" agreement.

As previously indicated, the terms of the alleged secret agreement between Firestone and McCreary have not been developed, and no proffer with respect thereto has been made. The court's finding must therefore necessarily be negative in nature. It is that there is no evidence legally sufficient to prove, or even to justify an inference as to, the existence of a secret or undisclosed agreement between Firestone and McCreary as to the conduct of this litigation, or the payment of the expenses thereof.

3. *Representations as to the effect of the joinder of McCreary.*

There appears to be at least an implication[15] that this court was misled into the belief that the joinder of McCreary might prevent transfer to Cleveland. In fact, plaintiffs' counsel at the July 6, 1961 hearing stated flatly that he did not so contend; that transfer was possible. The court was fully aware of this throughout the case, as indicated in its oral opinion of December 13, 1965 (Transcript, page 26,994).

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[15] Defendant's Exhibit D to Memorandum in Support of Renewed Motion.

It has been suggested that the fact that McCreary was an independent party prosecuting the case at its own expense may well have been a determinative factor in the denial of the first motion by defendant to transfer, that is defendant's motion of April 13, 1961 to dismiss or transfer, although the record is clear that the court was fully aware that McCreary's joinder did not prevent transfer (as indicated above) and although the court was fully aware that had Firestone desired to gain a technical advantage, suit could have been brought solely by McCreary with a silent, subsurface undertaking by Firestone completely to indemnify and save harmless McCleary.[16] That the court did not consider the fact that McCreary was an independent party prosecuting this case at its own expense a factor, much less a determinative factor, militating against transfer is evidenced by the court's oral opinion of July 6, 1961 denying the first transfer motion and its memorandum of October 14, 1963, denying the second transfer motion, in neither of which is the independence of McCreary, or the sharing of expenses, relied upon as a reason for the denials.

While the court has endeavored to cover the major points, the above memorandum does not purport to be exhaustive. The Court has however carefully considered all the memoranda and exhibits filed by the parties, all

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[16] "When the suit was filed, McCreary was a bona fide customer of Firestone as to oil-extended rubber for tread stock and camelback. As such, Firestone could have solicited McCreary to bring the suit as sole plaintiff on an undertaking by Firestone completely to indemnify and save McCreary harmless. A fortiori, the open participation by Firestone and at least partial sharing of costs by McCreary is not improper. See Wheeler v. Denver, 1913, 229 U.S. 342, and see also Schnell v. Eckrich & Sons, 1961, 365 U.S. 260. (Oral opinion of December 13, 1965; Transcript, pages 26,993-26,994).

transcript references and exhibits to which reference has been made, and the transcript of the oral arguments of counsel, upon the whole of which it makes the following general and ultimate

FINDINGS OF FACT

1. McCreary was an independent party throughout the entire period herein involved and still is an independent party.

2. McCreary agreed to and in fact did bear its proportionate share of the cost of litigation.

3. There is no evidence legally sufficient to prove, or even to justify an inference as to, the existence of a secret or undisclosed agreement between Firestone and McCreary as to the conduct of this litigation, or the payment of the expense thereof.

4. The fact that McCreary was an independent party prosecuting the case at its own expense, proportionally, was not a factor, much less a determinative factor, in the denial of the defendant's motion of April 13, 1961 to dismiss or transfer.[17]

5. No fraud, serious or otherwise, has been practiced upon the Court by the plaintiffs.

6. There has been no effort by plaintiffs to practice fraud upon the Court.

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[17] It is probable that if fraud were in fact intended, it would be immaterial whether or not the court had actually been misled. Hazel Atlas Glass Co. v. Hartford-Empire Co., 1944, 338 U.S. 238, 247; Keystone Driller Co. v. General Excavator Corp. 1933, 290 U.S. 240.

However, because of the language of the Court of Appeals that the alleged false representations "may well have been the determining factor in the denial of the transfer motion" (363 F.2d at page 89) this Court thought it advisable to make Finding 4.

CONCLUSIONS OF LAW

1. No fraud has been practiced upon the Court by the plaintiffs.

2. There has been no effort by plaintiffs to practice fraud upon the Court.

3. The renewed motions of April 13, 1961 to dismiss or transfer, of September 6, 1963 to transfer, and the motion for the imposition of sanctions, are each and all without merit, and should be and are denied.

R. DORSEY WATKINS
United States District Judge.

October 17, 1966.

SUPREME COURT, U.S.
FILED
FEB 20 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1053

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,

Petitioner,

and

THE FIRESTONE TIRE & RUBBER COMPANY,

Intervenor,

vs.

THE GENERAL TIRE & RUBBER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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February 17, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1053.

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,

Petitioner,

and

THE FIRESTONE TIRE & RUBBER COMPANY,

Intervenor,

vs.

THE GENERAL TIRE & RUBBER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

By a unanimous *en banc* decision, the United States Court of Appeals for the Fourth Circuit on January 12, 1967 entered a writ of mandamus directing petitioner, The Honorable R. Dorsey Watkins, District Judge for the District of Maryland, to transfer Civil Action No. 12,932 to the United States District Court for the Northern Dis-

trict of Ohio, Eastern Division. Respondent, The General Tire & Rubber Company, prays that the Court deny intervenor's petition for certiorari.

In the preceding paragraph, General Tire has been referred to as the respondent and Judge Watkins as the petitioner. The intervenor is Firestone. These references are based on the caption of the case in the Court of Appeals which, pursuant to Rule 31 of that Court, named General as petitioner, Judge Watkins as respondent, and Firestone as intervenor. The caption of the Petition for Certiorari is incorrect and should read as shown on this brief. Judge Watkins has not personally petitioned for certiorari, but he remains the nominal petitioner, and Firestone's status, granted by Rule 31 of the Court of Appeals, remains that of intervenor.[1]

STATEMENT OF THE CASE.

Firestone has set forth a statement of the case which is slanted and incomplete. Rather than burden the Court with a restatement of the case, however, respondent relies upon the detailed background set out in the opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1a).[2]

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1. The pertinent portion of Rule 31 is as follows:

"2. Where the purpose of the writ is to review a decision of a District Judge, he will not be required to file an answer or submit a brief, and his failure to do so will not be deemed an admission of any allegation in the petition. Each prevailing party in the District Court will be treated as an intervenor and shall not be required to submit a formal motion to intervene."

2. "Pet. App. ....." refers to the appendix attached to the Petition for Certiorari.

ARGUMENT.

The fact that transfer was ordered by the unanimous opinion of the Court of Appeals, sitting *en banc,* after the trial in Civil Action 12,932 had proceeded more than two years is dramatic evidence of the nature of the events in this case which had occurred at the level of the District Court. Firestone's actions before that Court had constituted an extraordinarily successful abuse of judicial process and interference with the administration of justice.

1. BACKGROUND.

Civil Action No. 12,932, the Baltimore litigation, began in March, 1961, three months *after* the Cleveland suits against The Goodyear Tire & Rubber Company and U. S. Rubber Company were filed by General Tire (Pet. App. 3a-4a). After the District Judge had refused in July, 1961 to transfer the Baltimore case to Cleveland, where a consolidated trial could be had (Pet. App. 4a), he was imposed upon by an unseemly, but successful attempt by Firestone to push the Baltimore case to trial before the Cleveland trial could begin. The progress of the earlier-filed Cleveland cases was impeded by the unfortunate continuing illness and subsequent death of Judge McNamee, to whom those cases had been assigned.

Each attempt by respondent to secure effective pretrial designed to narrow and clarify the issues was met by a charge from Firestone that respondent was merely stalling for time to advance the Cleveland litigation. The recommended procedures for protracted cases (Prettyman Report, 13 F. R. D. 62) were not followed or even attempted,

and *no* effective pretrial conference was ever had to narrow or clarify the issues. For example, despite General Tire's repeated requests, Firestone was never required to reduce the 125 prior art references and 61 alleged prior uses, nor to state what, if anything, each added to the other, nor even to state the relative order of their importance, although such reduction and statements are usually a matter of course.

The result of the inadequate and disorganized preparation for trial has been that the trial itself has been an endless discovery proceeding which has been fantastically expensive for respondent and which has unnecessarily clogged the docket of the District of Maryland and wasted nearly three years of judicial effort. To put it simply, the trial in Baltimore was completely out of control. The expected completion date grew farther away with time, not closer. For example, as General pointed out in its argument before the Court of Appeals, Firestone's latest prediction of the expected trial time remaining merely for its own testimony is longer than the time it predicted the entire trial would take in 1963 and even longer than its revised prediction made to the Court of Appeals in February, 1966. Another example of the loss of control in Baltimore is that as of the suspension of the trial the District Court had listened to 38,297 pages of record, a major portion of which was devoted to the issue of patent validity, an issue tried before Judge Holtzoff (pursuant to 35 U. S. C. § 145) in six days. *General Tire & Rubber Co.* v. *Watson*, 184 F. Supp. 344 (D. C. D. C., 1960).

2. JUDICIAL TIME WILL BE SAVED BY TRANSFER TO CLEVELAND.

In contrast to the chaos in Baltimore, the procedures being followed in Cleveland are calculated to greatly simplify the issues and reduce trial time. The recommended procedures for protracted cases are being followed meticulously, as can be seen from the pretrial order set out in the appendix to General Tire's reply brief filed in the Court of Appeals. In addition, the District Judge in Cleveland has acquired a good familiarity with the case by visits to rubber and tire making plants, by reading extensive briefs, and by his presiding over many pretrial conferences.

Trial was set in Cleveland for the *General* v. *U.S. Rubber* case for March 1, 1967, the *General* v. *Goodyear* case having been settled in February, 1966, with that District Judge's valuable and active assistance. A pretrial conference is presently set for April 3, 1967, at which time the question of consolidation is scheduled for discussion with Firestone and U. S. Rubber, if transfer has been effected by that date, and on April 3, 1967 the setting of a new trial date is also on the agenda.

Contrary to Firestone's representations, General Tire represents that the trial in Baltimore would have continued into 1968. In Cleveland, on the other hand, General Tire expects an effective narrowing of issues and pretrial agreement on documents and marking of exhibits so that the entire trial will take less time than it would have taken to finish in Baltimore. This will also make possible an effective appeal with a much less cumbersome record to present to the appellate courts. An effective appellate review of a 38,000 page wandering record and a presumably correspondingly lengthy trial court opinion is nearly impossible. Such a trial and appellate review, in an essentially simple patent case such as this, does not provide the just, speedy,

and inexpensive trial all litigants are promised by Rule 1, F. R. C. P.[3]

3. THE DECISION OF THE COURT OF APPEALS PRESENTS NO ISSUES REQUIRING REVIEW BY THIS COURT.

The opinion of the Court of Appeals clearly sets forth its own justification. General Tire considers it need only briefly outline the reasons the decision presents no issue requiring review by this Court. Under all of the veneer, Firestone's petition is no more than a plea that the Court of Appeals was wrong. It is to this contention that this brief is addressed, since there are clearly *no* conflicts with any decision of other Circuits or this Court, *no* constitutional question, and *no* overriding question of public importance.

a. The Court of Appeals Was Clearly Acting Within Its Discretionary Powers in Issuing the Writ.

The Court of Appeals correctly held that the question of its "naked power" to issue the writ of mandamus, pursuant to 28 U. S. C. § 1651(a), was beyond dispute. *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1956). *LaBuy* specifically so held at 255. Likewise, the power of Courts of Appeals to review transfer of cases by writ of mandamus has been accepted, at least *de facto*, by this Court in *Koehring Co.* v. *Hyde Construction Co.*, 382 U. S. 362 (1966); *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964); *Hoffman* v. *Blaski*, 363 U. S. 335 (1960); *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955); and *Ex parte Collett*, 337 U. S. 55 (1949).

There is no unseemly confusion among the Circuits on

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3. Rule 1 provides:

"These rules govern the procedure in the United States district courts in all suits of a civil nature. . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

the question of transfer review by mandamus, contrary to Firestone's contentions. The fact and law are and should be that mandamus can be granted in unusual cases, *such as the present.* It is also an essential safeguard against injustice, as this case demonstrates, and the Court of Appeals has inherent power to remedy a gross injustice independent of and in addition to its power to review transfer decisions.

The Court of Appeals was careful to point out that it was issuing the writ of mandamus because of its interest in the "effective administration and supervision of the courts of our circuit" (Pet. App. 18a). The Court went on to say, "It is obvious that if we postpone action until appeal after final judgment, the question will have become moot and the damage done" (Pet. App. 18a). Thus, the instant case comes squarely within the principles of *LaBuy.* It is the unanimous *en banc* action of seven judges exercising their collective discretion in the proper supervision of the lower courts, among other reasons:

> "to prevent an extravagantly wasteful and useless duplication of the time and effort of the federal courts by the simultaneous trial of two complex and elaborate cases involving substantially the same factual issues." (Pet. App. 2a).

Such supervisory action over the lower courts should be left primarily to the discretion of the Courts of Appeals of the various Circuits. As this Court said in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952), affirming a Court of Appeals' reversal of a District Court:

> "The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. The conclusion which we are asked to upset derives from an extended

> and careful study of the circumstances of this litigation . . . Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours."

Firestone complains that the Court of Appeals considered factors which were not of record and which were not properly before the Court. This point has no validity whatever. The entire history of General's various transfer efforts was before the Court of Appeals by way of General's renewed motion to transfer. On June 28, 1966, General renewed both its original motion to transfer dated April 13, 1961 and its renewed motion of September 6, 1963 (Appendix to General's petition before the Court of Appeals, p. 92). The September 6, 1963 motion was reviewed by the Court of Appeals by mandamus, *General Tire & Rubber Co.* v. *Watkins,* 326 F. 2d 926 (1964). Thus, *all* of General's contentions and Firestone's responses relating to transfer were before the Court of Appeals. Indeed, the Court did review contentions passed on at the first transfer mandamus and presumably reviewed the voluminous record submitted therewith which included documentation regarding convenience of the parties and witnesses.

There were two factors not presented to the Court on previous transfer attempts: one was the fact of the McCreary settlement and the other was the impending concurrent trial of the same issues in Cleveland (Pet. App. 3a). There can be no dispute concerning these facts, however, and Firestone has not denied them.

It is clearly apparent to General Tire that the action of the Court of Appeals in issuing the writ of mandamus was not a hasty, rash, or arbitrary decision, but rather very carefully considered. The Court of Appeals has indeed been "extremely reluctant to exercise its authority" to entertain petitions for mandamus (Pet. App. 6a). It denied

three prior mandamus petitions by General Tire *in this case,* and it is General's belief that this is the first instance in which the Fourth Circuit has ordered a case transferred by writ of mandamus. The Court of Appeals' action, *en banc,* was certainly not lightly undertaken.

Firestone cites *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U. S. 240 (1964) as authority for the proposition that the Court of Appeals should have remanded the case to the District Court rather than directly order the District Court to transfer. *Platt* is inapposite in that it arose under Rule 21(b) of the Federal Rules of Criminal Procedure and not 28 U. S. C. § 1404(a) and in that this case, unlike *Platt,* involves the general supervisory powers of the Court of Appeals over lower courts, pursuant to 28 U. S. C. § 1651(a), as well as the question of review of transfer, pursuant to 28 U. S. C. § 1404(a). Firestone, in its petition, erroneously attempts to confine the Court of Appeals to a simple Section 1404(a) analysis, even though it is patently apparent that this case involves many other factors relevant to the Court of Appeals' supervisory powers. Firestone avoids mention of the explicit requirement of Section 1404(a) that the "interest of justice" should be a prime consideration in transferring an action; the "just" determination intended by Rule 1, F. R. C. P.; or the implicit requirement of Section 1651(a) that the Court of Appeals has the right and duty to assure that justice is not abused in the courts of its circuit. The documentary background of this case set out in the opinion of the Court of Appeals clearly establishes that Firestone has not been pursuing justice in the District Court and that justice has not been done there, either with respect to the parties or to the mass of other litigants in Baltimore who were denied trial during the pendency of this trial.

That there is no conflict between the present case and *Platt* is further evidenced by the fact that this Court has

held that under proper circumstances, a Court of Appeals *on a mandamus petition* has the power to directly transfer a case pursuant to 28 U. S. C. § 1404(a) without going through the formality of ordering the District Court to transfer. *Koehring Co.* v. *Hyde Construction Co.*, 382 U. S. 362 (1966). At 364 of *Koehring* this Court distinguished the *Platt* decision.

Other recent cases in which Courts of Appeals have directed District Courts to transfer cases after finding an abuse of discretion in not transferring include *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299 (7th Cir. 1955) *cert. den.*, 350 U. S. 822 (1955); *Southern Railway Co.* v. *Madden*, 235 F. 2d 198 (4th Cir. 1956) *cert. den.*, 352 U. S. 953 (1956); *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (5th Cir. 1963); and *Chicago, Rock Island & Pacific Railroad Co.* v. *Hugh Breeding, Inc.*, 247 F. 2d 217 (10th Cir. 1957) *cert. dismissed*, 355 U. S. 880 (1957). *Igoe* was on mandamus.

b. The Factors Considered by the Court of Appeals in Ordering Transfer Are Well Supported by Precedent.

Two important factors considered by the Court of Appeals in ordering transfer were the forum shopping tactics of Firestone and the desirability of litigating multiple suits involving the same issues in one tribunal. Forum shopping by the plaintiff has been held to be an important factor in granting a defendant's motion to transfer in *Clayton* v. *Warlick*, 232 F. 2d 699 (4th Cir. 1956); *Polaroid Corporation* v. *Casselman*, 213 F. Supp. 379 (D. C. N. Y. 1962); and *Thompson* v. *Capital Airlines, Inc.*, 220 F. Supp. 140 (D. C. N. Y. 1963). Of course, the factor of plaintiff's choice of forum, which blinded the District Court is no longer entitled to the dominance it had under the common law doctrine of *forum non conveniens*,

especially where plaintiff's choice, as here, is tainted with improper and fraudulent tactics. *Norwood* v. *Kirkpatrick*, 349 U. S. 29 (1955).

The factor of the desirability of litigating multiple claims in one tribunal is emphasized by a host of recent decisions. *Axe-Houghton Fund A Inc.* v. *Atlantic Research Corp.*, 227 F. Supp. 521 (D. C. N. Y. 1964); *Atlantic City Electric Co.* v. *I-T-E Circuit Breaker Co.*, 247 F. Supp. 950 (D. C. N. Y. 1965); *Wilson* v. *Ohio River Co.*, 234 F. Supp. 283 (D. C. Pa. 1964); *Roberts Bros. Inc.* v. *Kurtz Bros.*, 236 F. Supp. 471 (D. C. N. J. 1964); *Color Technique, Inc.* v. *Don Wallace, Inc.*, 241 F. Supp. 952 (D. C. Ill. 1965); *Freiman* v. *Texas Gulf Sulphur Co.*, 38 F. R. D. 336 (D. C. Ill. 1965); *I-T-E Circuit Breaker Co.* v. *Becker*, 343 F. 2d 361 (8th Cir. 1965); *I-T-E Circuit Breaker Co.* v. *Regan*, 348 F. 2d 403 (8th Cir. 1965). In the present case, General Tire has suits pending in Cleveland against U. S. Rubber Company, The Firestone Tire & Rubber Company, The B. F. Goodrich Company, Carroll Tire, Inc., and The Mohawk Rubber Company, all involving the same basic issues.

A factor clearly implied, if not stated, by the Court of Appeals is that a speedier trial could be had in Cleveland. This factor has also received widespread approval by the courts. *Axe-Houghton Fund A, Inc.* v. *Atlantic Research Corp.*, 227 F. Supp. 521 (D. C. N. Y. 1964); *Haase* v. *Gilboy*, 246 F. Supp. 594 (D. C. Wisc. 1965); *I-T-E Circuit Breaker Co.* v. *Regan*, 348 F. 2d 403 (8th Cir. 1965); and *Ebel* v. *Spencer Chemical Co.*, 227 F. Supp. 956 (D. C. Mo. 1964).

Also, the Court of Appeals properly emphasized the fact that Firestone's co-plaintiff had settled since the first two motions to transfer were decided and that no serious argument could possibly be made now that Cleveland was not the most convenient forum by far. On the question of the convenience of witnesses alone, General represents that approximately 155 days of testimony were taken in Balti-

more from witnesses located in the Cleveland area compared with approximately six days of testimony from witnesses located in the Baltimore area.

The factors considered by the Court of Appeals were summarized in its statement at Pet. App. 14a that:

> "We think the district court erred in its failure to weigh the impelling need for efficiency in the administration of our court system against the right of Firestone to continue the trial in a forum which no longer offered to it any convenience over the Ohio forum."

4. THE FRAUD ISSUE.

General's position is that the written words and recorded statements of Firestone and its counsel set out in the Court of Appeals' opinion establish unclean hands and fraud *per se*. The primary authority for General's contention that the fraud practiced in connection with the first transfer motion in itself justifies a granting of relief to the prejudiced party on a renewed motion to transfer is *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944).

Firestone's complaint that it is prejudiced by a transfer after 38,000 pages of record is indeed presumptuous. It is General Tire that has been prejudiced by having to defend, during almost three years of trial, a case which, but for Firestone's fraudulent and improper conduct, should have been transferred in July, 1961 for trial with the pending Cleveland cases.

Firestone refers to the negative findings of the District Court on the question of fraud, but this question has yet to be ruled on by the Court of Appeals or this Court. It also should be noted that, even though in the third mandamus opinion (363 F. 2d 87, 90), the Court of Appeals had suggested that Firestone "may have practiced a serious fraud

upon the District Court" and suggested a renewed transfer motion, the District Court made no investigation whatever concerning the fraud. Firestone's counsel was not asked a single question by the Court concerning an explanation of the agreement charged to constitute a major part of the fraud, though this was suggested by counsel for General (Appendix to General's Petition before the Court of Appeals, pp. 97, 101). The result of this neglect on the part of the District Court to seek an explanation of Firestone's conduct was that the Court of Appeals itself examined Firestone's counsel on this point in open court at the argument on the mandamus petition. Relevant portions of this argument are reproduced in the appendix to this brief, at 2a-8a. In its opinion in the third mandamus action (363 F. 2d 87, 90), the Court of Appeals had suggested the possibility of its review of the renewed transfer motion. This unusual statement, plus the fact that an *en banc* hearing was granted in the present case, illustrates the concern of the Court of Appeals with the "interest of justice" and its realization that its supervisory powers under Section 1651(a) might have to be exercised.

The bare recital of Firestone's outrageous conduct set out in the opinion of the Court of Appeals in the form of memoranda and recorded words of Firestone and its counsel establishes, in General's opinion, a fraudulent imposition on General and the Court without precedent and clearly sufficient to require a dismissal of Firestone's declaratory judgment action. Much less then is Firestone entitled to complain here that its scheme to keep the case in Baltimore has been thwarted. Its conduct has been worse than that condemned by this Court in *Hazel-Atlas, supra,* and *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.,* 324 U. S. 806 (1945).

General is well aware of this Court's record in recognizing and remedying fraud where lower courts have found none,

Mammoth Oil Company v. *United States*, 275 U. S. 13 (1927) (the "Teapot Dome" case), and therefore, would ordinarily welcome a review of the fraud issue by this Court. In view of the Court of Appeals' decision, however, General believes this issue is not now ripe for independent review by this Court.

CONCLUSION.

No reasons have been presented to show why this Court should review the decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX.

PORTION OF ARGUMENT BEFORE COURT OF APPEALS.

(December 5, 1966.)

* * * * *

Mr. Merriam (For General Tire):

Our position on the law is quite simple, that the main question is, did Firestone present a real agreement or did it cite facts based upon a real agreement to this Court that were a sham, and of that there is no question from the tape. Judge Watkins based his opinion against us on the ground that there were no conflicts between Mr. Clark and himself, on the ground that McCreary was independent, and on the ground that I had not developed what the secret agreement was. The burden was put on me to find it out. I don't think it is material.

Mr. Irons was in court. He volunteered to be my witness, and he said even Mr. Clark's words were binding on me although he was an officer of the company.

I told the Court that this was a fraud on the Court, perhaps; that if it was a fraud I expected the Court to use his full powers of investigation and not make Mr. Irons my witness. I suggested that the Court might examine him if he wished. And that was the end of it. The Court did not examine Mr. Irons. He did nothing to investigate. The whole burden was put on me to find out from the mouths of my opponents what had been done.

Now, to me the documents are conclusive. The law of the Girardi case, as we pointed out in our brief, is that we don't expect conspirators to go up on the corners and

announce to the world what they did, but judge by the facts and the circumstances. We have done more than any case that I know of in producing those circumstances.

Judge Haynsworth: Thank you, sir.

Mr. Irons?

Mr. Irons (For Firestone): If the Court please, I don't think that Mr. Merriam has said anything that he did not say in his brief and which I think I have answered in mine. So I am going to make my comments rather brief and to the point about some of the things he did say.

Judge Haynsworth: I don't think he said a thing that wasn't in his brief, either, but maybe you can say something that wasn't in your brief.

On this tape Mr. Birch said he was relaying a message from you?

Mr. Irons: Yes, sir.

Judge Haynsworth: And he didn't know what it meant?

Mr. Irons: Yes, sir.

Judge Haynsworth: Can you tell us what it meant?

Mr. Irons: Yes, sir. I will answer your question as best I can, and when I finish I would like to make a comment not by way of explanation of what I say. I want to advert to this tape and do the best I can to answer the question.

I am looking for the transcript of the tape in this appendix.

Judge Haynsworth: Page 35.

Mr. Irons: Thank you.

Judge Winter: Appendix 35 of the Petition.

Mr. Irons: I might say that in my brief the questions which were raised by Mr. Merriam are in effect answered on the record, but I want to answer this anyway.

Mr. Birch said, at page 36:

> "Now, here is what we'd like to do, if it's all right with you, with full recognition that the agreement that was made between you and Stanley Clark is not going to, in the long run, change one tiny little bit." And he went on to say, "After this is all over with, why, everything will come out in the wash."

The question which has been posed by Mr. Merriam is, what is the agreement that was made between you and Stanley Clark which was not going to change one little bit, and what is it that was going to come out in the wash? I will answer that question.

Judge Watkins' Opinion reflects there was an understanding reached about the date the suit was filed that Firestone would carry the bulk of the expenses in this litigation. Plaintiffs' Exhibit 1836 shows that Mr. McCreary was advised that he would have to pay his way.

Now, as Mr. Clark also testified, which is at page 72 of the Intervenor's transcript, we did not have at that time any specific basis on which the payment of fees was going to be apportioned, and Mr. McCreary wasn't advised of any, and we didn't tell him of any or discuss it with him.

Judge Haynsworth: If there was no understanding, what was the agreement with Mr. Clark that was not going to change one tiny little bit?

Mr. Irons: That Firestone would carry the bulk of the expenses in the litigation.

Judge Haynsworth: It was not that they were going to pay them all?

Mr. Irons: No, Your Honor, it was not.

Judge Haynsworth: Well, then, why the suggestion "The agreement is not going to change one tiny little bit"? And at the end "It will all come out in the wash"? "We are going to bill you for one per cent of the charges."

Mr. Irons: What I want to answer about that is in the context of what Mr. Birch said it is something I told him to say, and it is this: The proposition which was offered to Mr. McCreary at that time was that he would pay one per cent because one per cent was the relative production basis. All right?

Judge Haynsworth: That's consistent with the general understanding that Firestone would pay the bulk of the expense, 99 per cent.

Mr. Irons: All right.

Judge Haynsworth: But he says now this isn't going to change the agreement you have with Mr. Clark one tiny little bit. Your explanation is that it fixes an unspecific understanding.

Mr. Irons: My explanation is not finished yet, Your Honor.

Judge Haynsworth: All right, sir.

Mr. Irons: I want to come to the "It will all come out in the wash" part and why the telephone call was made. I am going to answer the second question first.

The phone call of May 9th was made to fix a basis for billing Mr. McCreary on a percentage basis.

Now, "Everything will come out in the wash." As I can best recall it, Judge Haynsworth, I had some preliminary concern about this because I knew there would be many, many months—Our firm bills on a monthly basis. The record shows McCreary was billed that way. There would be many, many months when we would not work at all for McCreary and we would still send McCreary a bill. There would be other months when one per cent wouldn't come close to perhaps the time we had spent working for McCreary that month, and it was in that context, as far as what I meant, at the time I communicated to Mr. Birch that everything would come out in the wash, that

these bills would balance out over a time period as the suit went along. And we suggested that if we went on this one per cent basis and billed on a monthly basis one per cent, there would be—this is not on the tape. This is what you asked me for, my explanation.

Judge Haynsworth: Yes, sir.

Mr. Irons: That's what I meant. If I said it in words or substance to Mr. Birch, this is what I meant and what motivated it, that there would be some months when we do no work for McCreary and bill them.

Judge Haynsworth: And in your practice I suspect with your clients, you have an understanding about fees like this, you write them a letter, don't you?

Mr. Irons: I don't think I have ever written a client about a fee arrangement. I am quite serious about that. There may be exceptions but I don't think of any.

Judge Haynsworth: Perhaps you don't. You have an understanding about it but you don't say, "I don't want to talk about it too much for obvious reasons or put anything in the mail."

Mr. Irons: I don't want to evade that one, either. Mr. Birch said that he did not recall that I said that. He said that he didn't want to talk about the firm's billing. That's his recollection. I don't recall that I said any such thing to him.

Judge Haynsworth: But isn't this a fact, that it is in the tape, "I don't want to put anything in the mail and I don't want to talk about it too much for obvious reasons"? Doesn't that strongly suggest that the understanding was pretensive?

Mr. Irons: I don't think it does at all. I don't agree with Your Honor on that point at all.

Judge Haynsworth: Well, I am asking you whether

or not it doesn't suggest it because I want to hear what you have to say. I am not saying that I have any conclusion in my mind but these questions do arise in my mind when I read this tape.

Mr. Irons: Quite properly.

Now, I want to say flatly that, of course, the agreement was not pretensive, and I want to come back to that. This business about not wanting to put anything in the mail, as I said, I don't have any present recollection of why I said it or whether or not I said it to Mr. Birch, but if I said such a thing, my own judgment about it would have been that this was in the context of litigation and I didn't want to create any more documents than were necessary, not because there was anything to hide at all but just because this is a practice we normally follow in litigation situations, and we do not write a lot of papers which are unnecessary, and I don't know that I have said it or thought it at that time—I am talking about some effort to reconstruct—on December 5, 1966, why I may have said such a thing.

Judge Haynsworth: And yet, offhand, wouldn't it seem that if there had been a general understanding that Firestone would pay the bulk of the expense, that McCreary would pay a fair share, that you would specify the understanding so that you would know exactly what would be billed and this is what we will put it on?

Mr. Irons: I don't want to argue with you, Judge Haynsworth. It was not done. But McCreary did pay one per cent of the expense up until the time the lawsuit was settled.

Judge Haynsworth: This is what was agreed upon here.

Mr. Irons: That's right. And McCreary settled, Mr. Merriam told Judge Watkins, for $100,000, and we didn't pay the bill and we aren't holding McCreary harmless, and there is no secret agreement.

To the extent that there is an adverse inference to be drawn from the comment about putting something in the mail, it is unfortunate because there is no fact or evidence—

Judge Haynsworth: Well, it starts out with about the first thing, "The reason I wanted to call you is that we want to avoid any inference that you are our little patsy, and the way to avoid it is to bill you for one per cent in the course of each month."

Mr. Irons: Yes, Your Honor, because the fact was that McCreary was (A) independent, was (B) paying its own way, was (C) not held harmless.

Judge Haynsworth: At this time it wasn't.

Mr. Irons: This time is May 9, 1961.

Judge Haynsworth: Yes, I know.

Mr. Irons: On March 30, 1961, Mr. McCreary in Defendant's Exhibit 1836 had been told two things: One, that he would have to pay his own way and, two, that if he lost, we lost, and he wasn't going to be held harmless. At that point in time there had been no arrangement made as to how the fees were going to be divided. That remained to be done.

Frankly, our office overlooked, and it is probably I overlooked billing McCreary at the end of March. This was March 30th, our billing time for April came up early in May. It was necessary at that time to decide upon how McCreary was going to be billed. I am quite sure that's why that telephone call was made, and Mr. Clark himself said as to why the call was made, he supposed it was for that reason.

Now I want to come back to where I was about this "patsy" business. McCreary was not a patsy; McCreary was independent. McCreary did not have a hold harmless, McCreary was paying its own way, and if we were

ever asked, I wanted to be able to show that we had, in fact, implemented this, which was in fact the agreement pursuant to which McCreary was paying its own way. That's why I wanted to bill them. That's why we did bill them just like we bill anybody else.

* * * * *

Judge Craven: What's happening in Ohio? Is the trial still proceeding in Baltimore or is the trial going on in Ohio?

Mr. Irons: This brings up another very interesting question. I want to answer that.

What's happening in Ohio, as I understand it, specifically, is that the trial of the U. S. Rubber case has been scheduled to begin I think it is on March 1st. Judge Craven, subject to correction.

To answer your other specific question, yes, the trial is still going on in Baltimore. Mr. Merriam said in his opening brief he couldn't predict how long the trial was going to go on in Baltimore. He got more knowledgeable in his reply brief and he said that he thought it was not going to end until 1968.

I filed this morning a supplemental appendix. All it contains with one exception is pertinent portions of the record of the proceedings before Judge Watkins on November 29, on which day I reported, pursuant to direction from Judge Watkins, my own best estimate of how long it would take us to conclude our case. Mr. Merriam when I got through said that he thought two weeks, and I think my minimum estimate was 48 days and a maximum of 67 for the plaintiffs' case. Based on that, Judge Watkins spoke in terms of hearing argument about the end of September and having briefs submitted before that.

Now, that's what the record is on where the case is in Baltimore.

* * * * *

Mr. Merriam: May I have a few minutes?

Judge Haynsworth: Mr. Merriam.

Mr. Merriam: In the first place, the question as to the scope of the other case that Judge Craven asked about, when this case was first up here, Mr. Howard said on page 4 of what I have here as a supplemental appendix, that the whole case would take three months. When it was up here last February, Mr. Irons said that it should be over by June. He has now told Judge Watkins, leaving out the German witnesses who haven't been finished, leaving out my rebuttal, and assuming that cross-examination would be on a one-to-one ratio, or as it has been, three to six in the case, that he will take 68½ days.

I said I had two weeks as of now, and I hadn't heard of 68½ days of rebuttal, and based on this kind of history I can't say that the case will be over any earlier than I said before.

So far as Mr. Irons' statement of the case is concerned, which of course is entirely new to me, I have nothing to add to the questions which the Court asked of him. I don't think it makes a consistency, but I will point out that the record itself shows that McCreary had work done for it and it alone in March, when Mr. Irons had a plane go up to Indiana, Pennsylvania, with Mr. Birch to tape record a conversation with Mr. Earnheart, not to Mr. Earnheart's knowledge. If the situation had been as Mr. Irons said it, it does not make sense with the rest of the documents.

SUPREME COURT, U. S.
FEB 28 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

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v.

THE GENERAL TIRE & RUBBER COMPANY and THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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"Respondent's Brief in Opposition" demonstrates compelling reasons for the grant of certiorari.

1. Respondent's references to the Fourth Circuit's power of administration and supervision over courts within that Circuit do nothing to counteract the conflict between the exercise of such power in the context of this case and the principles established in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240. Like all other powers, supervisory power must be exercised within the limits prescribed by law, and *Platt* has established the limits beyond which the Fourth Circuit may not go in supervising transfers of cases in district courts. And nothing in *Platt* suggests that its princi-

ples are limited to the transfer of federal criminal prosecutions.

Certainly the general desirability of avoiding multiple and wasteful litigation in federal courts gives the Fourth Circuit no basis for ignoring the *Platt* limitations on its power. Such authorities as this Court's opinion in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, and the Second Circuit's action in *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F. 2d 145, both relied upon by the court below, supply no answers to the problem whether a federal appellate court can formulate and then execute its own *de novo* standards of transfer; both *Kerotest* and *Hammett* dealt with enjoining or dismissing before trial the prosecution of a wasteful identical suit rather than with the *de novo* transfer of one suit long after trial had commenced.

Moreover, respondent's references to the factors considered by the Fourth Circuit serve only to emphasize the *de novo* nature of those factors and the complete lack of opportunity afforded Firestone to brief and argue the relevance of those factors. Nothing in the prior mandamus records, let alone the instant record, justified the Fourth Circuit's consideration of the *present* convenience of the parties and witnesses or of the *present* availability of trial proceedings in Ohio. The unmitigated conjecture that permeates the opinion below underscores the denial of fair appellate procedure involved in the Fourth Circuit's blatant rejection of the *Platt* principles.

2. General Tire represents that it has suits "pending in Cleveland against U.S. Rubber Company . . . The B. F. Goodrich Company, Carroll Tire, Inc., and

The Mohawk Rubber Company" (R. Br. 11)—but there has been *no* discovery in the Goodrich or Mohawk cases, which were not filed until 1967, or in the Carroll case.[1] Nor has discovery as yet been *completed* even in the U.S. Rubber litigation. Obviously the Baltimore case, with its massive three-year record, simply cannot be consolidated with the Cleveland suits. Consolidation is possible only if Firestone is forced to start anew in Ohio.

3. Civil Action 12,932 is not "an essentially simple patent case" (R. Br. 5), as General *now* represents.

The truth is that General intends domination of the entire domestic passenger tire industry by its patent 2,964,083—and domination of the same industry in the balance of the free world by twenty-two counterparts of the same patent. But the complexities of the case and the public interest in the result are in no sense measured solely by patent parameters.

The "invention" of the patent in suit was allegedly made while General was a participant in the government synthetic rubber (Rubber Reserve) program on

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[1] Carroll was joined as a codefendant with McCreary in a 1961 suit belatedly filed by General in Ohio to frustrate the Firestone and McCreary litigation in Maryland. Prosecution of the McCreary-Carroll case in Ohio was enjoined by Judge Watkins on July 6, 1961, and the injunction was not lifted until September 1966, subsequent to the independent McCreary settlement on July 18, 1966.

The Goodyear settlement was a "bet" upon the outcome of the Maryland litigation involving Firestone. Goodyear agreed to pay General two million dollars on the understanding that one million would be refunded if Firestone prevailed in Baltimore, but that a third million would be paid to General if Firestone lost.

General also undertook to license or sue Goodrich within one year of the settlement date. The newly-filed Goodrich case is understood to be the result.

which several hundred million dollars of public funds were expended during the 1942-1955 time period. A central issue in the Maryland litigation is whether Firestone enjoys a worldwide royalty-free license to use the subject matter of patent 2,964,083 by operation of a research agreement consummated as of January 1, 1949 between General and the Reconstruction Finance Corporation—a research agreement pursuant to which General Tire was paid some millions of dollars of public monies.[2] If Firestone is right in its contention that the patent in suit is licensed by the General research contract, all major domestic tire producers will enjoy a worldwide royalty-free right under patent 2,964,083 by operation of the same contract.

This contract-license issue may well be dispositive of the whole of the Maryland case—and its resolution in Maryland in favor of the asserted license will be binding on Respondent General in Ohio and dispositive of the litigation in that forum as well.[3] Judge Watkins and Judge Watkins alone can properly and fairly resolve this dispositive issue in view of the death or

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[2] Paragraph 9(b) of the amended complaint states in pertinent part:

> "9. United States patent 2,964,083 is not infringed by Firestone because
>
> * * *
>
> "(b) Firestone has a worldwide royalty-free license under any information disclosed in and the alleged invention covered by the said patent and any and all foreign counterparts thereof, *inter alia*, because:
>
> * * *
>
> "(3) General entered into an agreement with RFC dated January 1, 1949, a copy of which is attached to the original complaint as Exhibit A . . ."

[3] In Cleveland, Goodyear and U.S. Rubber alleged noninfringement on the basis of the same license agreement.

present unavailability of many of the key witnesses who have testified before him. And, as noted in the Petition (Pet. 23, note 19), if the patent is held *invalid* in Maryland, General would have no right to a second trial of the validity issue in Ohio in any event. See *Nickerson* v. *Pep Boys—Manny, Moe and Jack*, 247 F. Supp. 221 (D. Del. 1965). Thus, even the interest of "judicial economy" which the Fourth Circuit Court of Appeals found paramount in ordering transfer is not served by transfer at all—but only by a prompt decision by Judge Watkins in C.A. 12,932.

The public interest which attends all patent litigation hence applies with particular force to demand immediate completion of the Baltimore trial. The grant of certiorari is essential to insure that Firestone's challenge to the enforceability of patent 2,964,083—a challenge that " 'is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it.' " *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394, 401, 91 L. Ed. 374, 379 (1947) [quoting *Pope Mfg. Co.* v. *Gormully*, 144 U.S. 224, 235, 36 L. Ed. 414, 418, 12 S. Ct. 632 (1892)]—is not now contravened, on the eve of judgment.

4. A far more fundamental question and one of transcendent importance is implicit in these proceedings. Basically the issue is whether the rule of law is vulnerable to the repeated use, as a trial tactic of ill-founded charges of fraud, bias and bad faith launched without scruple not only against an opposing party, its counsel and its witnesses, but against the trial judge as well. *Cf. In Re Woodmar Realty Company*, 294 F. 2d 785, 792, 795 (7 Cir. 1961); *Gallo* v. *Hirst*, 332 F. 2d 178, 179 (4 Cir. 1964).

Contrary to the representations of Respondent (R. Br. 3, 4), the pretrial procedures were difficult and the trial lengthy not because of any laxity on the part of Judge Watkins but rather as a direct consequence of the practices of General and its counsel. Judge Watkins was nearing the end of the unnecessarily long and complex trial over which he had presided with utmost objectivity and under the most difficult circumstances for almost three years when the writ of mandamus was issued on January 11, 1967. The commendable patience which Judge Watkins has exercised throughout these trying proceedings is best illustrated by a succinct review of General's vacillating conduct before him.

Not only did General fail to seek timely appellate review of the July 6, 1961 decision of Judge Watkins denying transfer—it proceeded for more than two years to prepare actively for trial in the Baltimore court. Shortly after Mr. Merriam was first appointed chief trial counsel for General, he stated in a letter to Judge Watkins on January 3, 1963: "Defendant joins with plaintiffs in requesting an early trial *in this Court* on the issues of validity and infringement. . . ." In the same letter Mr. Merriam stated, "It is . . . my intention that the expression of Your Honor that the case be tried no later than *October* be fulfilled." As late as May 20, 1963, Mr. Merriam again confirmed his acceptance of the Maryland forum and Judge Watkins as well by requesting that the trial be postponed from October 1963 to January 1, 1964 because "I am sure I can be ready by then and I am certainly not sure I can be ready by October 7th."

But as the trial date approached, General had a complete change of heart, presumably occasioned by

dissatisfaction with Judge Watkins' pretrial rulings. A "renewed" motion for transfer was filed September 6, 1963 and denied October 14, 1963. While the consequent "transfer mandamus" was pending in the Fourth Circuit Court of Appeals, General filed its "Affidavit of Personal Bias and Prejudice" to disqualify Judge Watkins under 28 U.S.C. 144. In his memorandum rejecting the affidavit, Judge Watkins stated:

> ". . . Defendant's complaint largely seems to be that it was not permitted in its sole discretion to determine where and when the case should be tried, and where, when, by whom, and to what extent, discovery should be allowed or denied."

Having failed in its efforts to avoid trial before Judge Watkins through transfer or disqualification, General, on January 15, 1964, filed a baseless jury trial demand, having no counterpart in the Cleveland actions. In his answer to the ensuing "jury trial" mandamus, Judge Watkins stated:

> "The motions for a jury trial appear to be an attempted revival of the matters raised by the Affidavit of Personal Bias and Prejudice. . . . The motions appear to be dilatory in nature both with respect to their time of filing and their consequences even if granted. . . ."

On November 18, 1965, after about eighteen months of trial, General opportunistically seized upon the decision of the Third Circuit Court of Appeals in *Rapp* v. *Van Dusen,* 350 F. 2d 806 (3 Cir. 1965), in yet another specious attempt to disqualify Judge Watkins for "misconduct" incident his answers filed in the two preceding mandamus petitions.

While the ensuing "disqualification mandamus" was *sub judice* in the Fourth Circuit, Judge Watkins, on

April 26, 1966, conducted a hearing in which the matter of the tape recording reproduced in footnote 7 of the opinion below (Pet. App. 11a) was fully investigated. At the conclusion of the hearing General disdained Judge Watkins' invitation to request from him such relief as it might desire. Instead General proceeded directly to file inflammatory and ill-founded fraud charges in the appellate court. No reference was made by General to the April 26, 1966 hearing before Judge Watkins although Firestone adverted to it in reply. In its opinion on the disqualification mandamus, 363 F. 2d 87, 90, the appellate court directed General, if it intended to pursue these charges, to present them in the first instance to the trial court. It is these fraud charges which Judge Watkins found to be totally without merit—a finding which the Fourth Circuit Court of Appeals expressly and properly abstained from considering—which General now relies upon in this Court in justification of the "transfer" order (R. Br. Sec. 4, p. 12 *et seq.*).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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